

Date: April 6, 1995

Case Nos.: 93-ERA-7  
93-ERA-8

In the Matter of

JAMES J. DEAN,  
DAVID R. LAMB,  
Complainants,

v.

HOUSTON LIGHTING AND POWER COMPANY,  
Respondent

S. Tanner Garth, Esquire  
For the Complainants

Roy O. Minton, Esquire  
Ross E. Cockburn, Esquire  
For the Respondent

BEFORE: EDWARD TERHUNE MILLER  
Administrative Law Judge

#### RECOMMENDED DECISION AND ORDER

##### Statement of the Case

This case involves two claims under §210 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851 (ERA), and the implementing regulations at 29 CFR Part 24.<sup>1</sup> The Complainants, James J. Dean (Dean) and David R. Lamb (Lamb), each filed timely complaints with the Department of Labor (DOL) on May 26, 1992, alleging that they were terminated from employment by Houston Lighting and Power Company (HL&P) because of certain acts by them which constituted protected activities under the ERA.

The Department of Labor Investigator concluded that Dean and Lamb were terminated because they had engaged in protected

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<sup>1</sup>The amendments to the ERA contained in the Comprehensive National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992)(CNEPA), do not apply to this case, because the complaints were filed prior to the effective date of that Act. References, therefore, are to the provisions as codified in 1988.

activities and recommended remedial action.<sup>2</sup> Following the investigation, the District Director, Employment Standards Administration of DOL, found violations as alleged by the Complainants and concluded that the Complainants had been discriminated against as defined and prohibited by the ERA and 29 CFR §24.4. HL&P appealed the District Director's decision on November 24, 1992, and demanded a hearing. The complaints were consolidated, and all parties were represented by counsel at the de novo hearing, which was conducted in Houston, Texas, on August 25-September 3, 1993, and resumed and completed on November 1-11, 1993.<sup>2</sup>

It is undisputed that HL&P is an employer subject to the ERA, and, specifically, the employee protection provisions in §210 of the ERA. Likewise, it is undisputed that Dean and Lamb were at all relevant times employees entitled to invoke the employee protections provided by the ERA upon a proper showing. It is undisputed that Dean and Lamb were terminated from their employment by HL&P on May 4, 1992.

The findings and conclusions which follow are based upon the observations by this tribunal of the appearance and demeanor of the witnesses who testified at the hearing as it affects their credibility, and upon an analysis of the entire record, including the testimony and documentary evidence, in light of the arguments presented, the statutory law and applicable regulations, and the

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<sup>2</sup>(C-12B, 13) An Investigative Report completed in February 1993 by the Office of The Inspector General, U.S.Nuclear Regulatory Commission, reached a similar conclusion. (C-2)

<sup>2</sup>Citations to the transcript of the proceedings, except those conducted on November 1, 1993, are designated "Tr."; the transcript of proceedings on November 1, 1993, is designated "Tr.A." Certain portions of the transcript of proceedings in November, 1993, were designated as "Safeguards Information" which required protective custody. A redacted version of the same transcript from which Safeguards Information has been removed was prepared and has been used in preparing this decision. Those portions of the transcript of hearing are designated "Tr. [page nr.]S." The redacted version has superimposed page numbering, but the original page numbering is referred to with respect to the redacted version unless otherwise indicated. Complainants' exhibits are designated "C"; HL&P's exhibits are designated "HL&P-"; the tribunal's exhibits are designated "ALJ-." By agreement of the parties, the time constraints that are applicable to whistleblower cases were waived. The necessity of continuing the hearing to a second session caused the waiver of 29 CFR §24.6. Submission of post-hearing briefs relating to a complicated and extensive factual and legal record required waiver of 29 CFR §24.6(a) and (b).

applicable case law.<sup>3</sup> The evidence in this sizeable record which has not been discussed specifically has been determined to be immaterial, or insufficiently probative to affect the outcome directly.

### Introduction

The Complainants Dean and Lamb contend that they were unlawfully fired by HL&P because of security concerns that they expressed within STP and to the NRC. They contend that their

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<sup>3</sup>With their Reply Brief, Complainants submitted two attached exhibits. Exhibit 1 was a copy of an NRC Inspection Report dated January 21, 1993, relating to an assessment of the employee concerns programs at STP, including the Speakout program, and its predecessor and successor programs. Exhibit 2 consists of documents associated with the NRC's response to a Freedom of Information request made by Complainants' counsel. The exhibit includes inventories of documents treated, and a redacted copy of a letter from HL&P's counsel, Gutterman, to the OIG of the NRC dated August 6, 1993. The letter concerned several matters, including an allegation that an HL&P filing in this case included a Safeguards document related to HL&P's motion to dismiss Dean's case.

HL&P moved promptly to strike the exhibits and those portions of Complainants' reply brief that discuss them on the grounds that the inspection report was irrelevant and incomplete. The motion did not specifically address the second exhibit. Claimants then filed a Motion To Accept Exhibits, asserting that Exhibit 1 was relevant to HL&P's contention that the Speakout program was viable and trustworthy, and that Exhibit 2 was relevant to HL&P's credibility and within the scope of discovery sought by Complainants as an admission against interest. HL&P's letter/memorandum in response contends that production of the documents was not required because HL&P had objected to the vague and overly broad interrogatory.

This tribunal is persuaded that, while the exhibits might be relevant, their materiality is too attenuated to overcome the timing of their submission, and the distraction of relatively tangential issues that, arguably, could require further ventilation in order to establish a reliable set of relevant facts. In addition, they are viewed as cumulative evidence of credibility, which has been adequately explored in the course of a lengthy hearing. The motion to strike is therefore granted, and neither the documents nor the arguments related to them have been considered in rendering the decision in this case.

expressions of concern qualified as protected activities; that the decision makers at HL&P had knowledge of their protected activities; that the reorganization of NSD which resulted in their terminations was a pretext; that if the reorganization was not a total pretext, its predominant purpose was to retaliate against them and to terminate their employment at STP; that the rating process which was used to justify Complainants' terminations was fatally flawed by lack of objectivity and other substantial deficiencies; that the process was merely a pretext for the dismissals in retaliation for their protected activities which had proved burdensome to HL&P; and that, as a consequence, their terminations constituted unlawful adverse action against them under the ERA.

HL&P contends that Dean and Lamb were terminated, not because of any protected activity, but because of a bona fide, business motivated reorganization which justifiably resulted in a reduction in force. HL&P concedes that Dean and Lamb engaged in protected activity when they went to the NRC, but denies awareness of it, and denies that any protected activity by Dean or Lamb was a factor in their terminations. (Tr. 124-25) Termination for cause at the time of their actual dismissals is not in issue.

HL&P contends that the terminations occurred after an appropriate and fair competitive evaluation of the relevant work force was conducted for the legitimate business purpose of reducing the work force, and that Dean and Lamb had the least favorable competitive evaluations. HL&P denies that Balcom, or any of the persons making the decisions which led to Lamb's and Dean's terminations, had knowledge of Dean's or Lamb's protected activities. HL&P contends that, even if HL&P or its management had had such knowledge, HL&P would not have been motivated by that knowledge to retaliate against Lamb and Dean. HL&P also contends that in the Fifth Circuit the only activity for which Dean and Lamb can be afforded protection is their contacts and meetings with NRC agents in the spring and summer of 1991, prior to the time Balcom became manager of the NSD.

HL&P contends that Complainants have not proved the requisite knowledge of the Complainants' protected activities. Thus, HL&P contends that Complainants have failed to prove an essential element of their prima facie case. Such knowledge was categorically denied by all HL&P personnel who would have had any role in the decision to terminate Dean and Lamb. HL&P contends that, in any event, the retaliation alleged would have been improbable and out of character for those HL&P managers who were involved.

HL&P contends, in addition, that there is an independent basis for terminating Dean. In May, 1993, a document containing "Safeguards Information" was found abandoned in his recently vacated apartment. HL&P contends that this evidence supports a

finding of deliberate violation of the ERA which would bar Dean from any remedy under the ERA pursuant to §210(g), even if his claim of discrimination were vindicated. HL&P contends, in addition and in the alternative, that Dean's possession of that Safeguards Information under such circumstances, under the so-called after-acquired evidence doctrine, would have constituted sufficient grounds for Dean's termination in any event, had HL&P known of these circumstances, and had HL&P had such evidence, at the time of Dean's termination. Dean contends that he never had the document, and that, in any event, the document in question contains no Safeguards Information that would be the basis for a violation of procedure or regulation under the ERA.

The resolution of these issues in this decision is organized as follows. The findings of fact set out a chronology of events from 1988 until May 1992. An integral part of that chronology traces responses to certain concerns raised by Complainants within that time period. Those concerns are shown to be so well defined, and so visible, and so identified with the Complainants, that the decision makers who were involved must have suspected the Complainants of the protected activities in question, and to have acted on the basis of those solidly grounded suspicions in their dealings with Dean and Lamb. The evidence establishes circumstantial proof of knowledge by the HL&P managers who functioned as decision makers in effecting the Complainants terminations. Because HL&P's decision makers categorically deny having the requisite knowledge which is essential to proof of a causal nexus between the protected activities of the Complainants and their terminations, the proof of knowledge is wholly circumstantial.

Although these suspicions of HL&P management did not necessarily rise to certainty, they engendered assumptions and actions which prove circumstantially that the managers of HL&P who participated in the process leading to the Complainants' terminations did have such knowledge as would establish that element of both the prima facie case and the merits of Complainants' claims. The findings of fact establish other circumstances that, when considered on the record as a whole, prove by a preponderance of the evidence that there was a causal nexus between the Complainants' protected activities and their terminations.

The second portion of the opinion discusses the law applicable to these detailed and complex facts. Some of the applicable law is peculiar to the Fifth Circuit. This discussion sets out the rationale upon which I find that the Complainants are entitled to relief because their discharges were effected in violation of the ERA.

The final section of the opinion deals separately with both the facts and the law applicable to HL&P's motion to dismiss Dean's

claim because of the discovery, approximately a year after his termination, of the document allegedly containing Safeguards Information among the effects abandoned in his apartment. I find that, although there is insufficient proof of a deliberate violation of the ERA to bar relief to Dean under §210(g), there is a technical violation of Safeguards Information requirements that requires a conclusion, under the circumstances, that HL&P would have fired Dean on that ground alone had it known of the violation on or before May 4, 1992. As a consequence, Dean's entitlement to relief is restricted by a recent Supreme Court decision.

### Issues

(1) Which, if any, of Complainants' whistleblowing activities were entitled to protection under the ERA;

(2) Whether Complainants have proved that HL&P had legally sufficient knowledge that Dean and Lamb had engaged in protected activities to establish a prima facie case;

(3) Whether Complainants have proved that there is a sufficient nexus between their terminations by HL&P and protected activities of which HL&P was aware to support an inference that the terminations were motivated by those protected activities, and so to establish the requisite prima facie case of wrongful termination;

(4) Whether the reorganization of STP's Nuclear Security Department (NSD) was a pretext for terminating Lamb and Dean;

(5) Whether, if HL&P had a legitimate motive for the reorganization of the NSD, Complainants have proved by a preponderance of the evidence that HL&P's predominant motive for reorganizing NSD as it did was to effect termination of the Complainants because of their protected activities;

(a) Whether, if the evidence establishes a dual motive for its adverse actions, HL&P has proved by a preponderance of the evidence that it would have terminated Dean and Lamb regardless of their protected activities;

(b) Whether, under the rule adopted by the Fifth Circuit, Complainants would not have been terminated by HL&P but for their protected activities;

(6) Whether Dean's alleged possession of a particular document allegedly containing Safeguards Information, if known by HL&P, would, under the circumstances, have caused HL&P to terminate him without regard to any protected activities;

(7) Whether Dean's possession of such a document under the circumstances bars Dean from all relief pursuant to §210(g) of the ERA.

### Partial List and Description of Involved Personnel

Certain individuals in addition to Complainants who will be frequently referred to hereinafter by their last names had significant roles in the events affecting Claimants' termination.

For convenient reference their names and identities are noted as follows:

Richard L. Balcom, Director, Nuclear Security Department (NSD), beginning in January 1992; successor to Randlett; previously manager, Quality Assurance (QA) under Jordan, at South Texas Nuclear Project (STP)

A. Bill Beach, Director, Division of Reactor Projects, Nuclear Regulatory Commission (NRC)

Ricky Wayne Cink, Senior Investigator for Speakout (formerly Safeteam) Programs at STP

Don Driskill, Regional Inspector, Region IV, NRC

James Drymiller, Security Coordinator, NSD; certified classification officer

A. Bruce Earnest, Security Inspection, Region IV, NRC

Al Gutterman, Washington D.C. Counsel to STP for nuclear licensing matters<sup>4</sup>

Don P. Hall, Group Vice President, Nuclear, at South Texas Nuclear Project (STP); the senior person in charge of the nuclear program at Houston Lighting and Power Company (HL&P)

J. Watt Hinson, Administrator of Compliance, Investigations and Fire Watch at STP, divisions associated with NSD. Hinson was transferred to Licensing Department as Manager of Access Authorization in 1992.

Thomas J. Jordan, General Manager, Nuclear Assurance, at STP

William J. Jump, Manager, Nuclear Licensing, at STP

Warren H. Kinsey, Jr., Site Vice President, Plant Support, at STP; reporting to Hall

M. Monteith, Auditor, Nuclear Assurance, at STP

John Rex Moore, supervisor, NSD, under both Randlett and Balcom

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<sup>4</sup>The law firm with which Gutterman was associated primarily provided advice and counsel on licensing matters to STP/HL&P. Nuclear Licensing Department is "one" interface with the NRC regarding the requirements of the NRC and conditions of STP's/HL&P's license. (Tr. 2203-04, Jordan)

James Neal, Supervisor, Compliance Division, NSD; reported to Hinson; his two subordinates were Bill Worth and Mike Hall.

Eric Gary Pomeroy, Senior Security Coordinator at STP

William Randlett, Manager, NSD, until January 1992, when he resigned

David Sheesley, Compliance Coordinator, NSD. Sheesley was promoted to Supervisor in the Access Authorization Department. He was the supervisor of Safeguards work of Dean.

Joseph Tapia, Senior Resident Inspector for STP, NRC

William Tobin, Office of Inspector General (OIG), NRC

### Findings of Fact

#### Chronology Relating to the Reorganization of NSD

1. Dean and Lamb were employed in the Nuclear Security Department (NSD) of the South Texas Project Electric Generating Station (STP) of HL&P. STP was the nuclear power generating plant owned and operated by HL&P as part of a public utility consortium providing electric power to the Houston, Texas, area. STP operated as a relatively autonomous element of HL&P because of the special operational characteristics of such a nuclear power plant.<sup>5</sup>

2. Dean and Lamb were both hired by HL&P to work at STP in 1986. Lamb was instrumental in getting Dean hired by HL&P, and was somewhat of a mentor to Dean. Both men held a number of different positions during their respective tenures at STP. Lamb was a supervisor and at times was Dean's supervisor. Dean was a subordinate professional, who had various supervisors. Both men

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<sup>5</sup>The credibility of witnesses who testified at the hearing is central to the weighing of the evidence in this case. Because of the nature of the issues and the evidence, however, credibility determinations are, for the most part, implicit in the particular substantive findings I have made. Witnesses whose testimony I have disbelieved with respect to particular matters in dispute, may have given credible testimony as to other matters. My credibility determinations were based upon my observations of the demeanor of the witnesses on the witness stand, my assessment of the substance and qualities of their testimony within the context of the record as a whole, and my assessment of their motives, possible biases, incentives, and situational status and concerns, within the hearing room, with respect to their current employment, and otherwise. (ALJ-1,2,3,4)



were at all relevant times in NSD. Both worked together or jointly in dealing with their security concerns during the relevant period.

3. There does not appear to have been any significant security issue which is material to this case in which they were not both involved to some degree, although, because of Lamb's status as a supervisor, and because of Lamb's greater age and experience, he tended in some instances to take a larger and more visible role. Both men were terminated on May 4, 1992, as a consequence of an internal departmental reorganization of NSD which resulted in a reduction of force unique to NSD that included them and one other NSD employee, Worth. Consequently, their activities are properly considered together, rather than separately, even though their relative responsibilities for particular concerns may have varied from time to time. A fourth employee, Neal, who was Worth's supervisor, had resigned prior to the terminations of Dean and Lamb, because, he testified, he expected to be terminated as part of the process because the Compliance Section in which he was a supervisor was to be abolished, and because of his whistleblowing activities. (Tr. 2905-09, Neal)

4. Between 1988 and the end of 1991 Dean and Lamb expressed concerns with what they considered to be several significant breaches of security requirements at STP. Both men had expertise and experience in relevant security matters at STP, including the concerns they raised. Many of their concerns were vindicated wholly or in part after investigation by higher authority. None of the concerns were alleged or proved to be frivolous or not raised in good faith. They also appear to have been motivated exclusively by professional, rather than self-serving, concerns.

5. Over approximately four years beginning in 1988, Dean and Lamb communicated their concerns to their peers, to HL&P management directly, through Speakout, an anonymous employee complaint program within STP, and to representatives of the Nuclear Regulatory Commission (NRC). Seven specific concerns were identified by the parties. Dean and Lamb allege that these concerns involved significant protected activities with which they were closely identified. The issues, which are referred to seriatim in greater detail below, involved,

- (1) The visitor access issue;
- (2) Compensatory requirements for lighting failures;
- (3) Management key access to vital spaces;
- (4) The lockdown procedure for Electrical Generating Unit 2
- (5) Response to a power outage;
- (6) The allegedly inappropriate relationship between the NRC inspector, Earnest, and Randlett of NSD;
- (7) A damaged security door knob.

These issues were well defined and had continuing vitality until resolved. Most of them were the subject of one or more

investigations and findings by the NRC. HL&P also investigated most of them itself. HL&P contended that, for the most part, Complainants' concerns merely involved differing interpretations of regulatory requirements.

6. Dean and Lamb's concerns for the most part initially related to decisions by Randlett, who headed the NSD at STP from the time that Lamb's and Dean's concerns were first raised in late 1988 until he resigned and was replaced by Balcom in early 1992. Lamb and Dean first raised their concerns with Randlett. Because they were outspoken and persistent in asserting their particular concerns, which were clearly defined, Lamb and Dean were conspicuous in the relatively small NSD, and other reaches of STP as well. Lamb's and Dean's association with these concerns also became known in other parts of STP which were affected by or became involved with them. (Tr.A. 86-88, Worth; 1504-06, Moore)

#### Identification of Dean and Lamb with Protected Activities

##### Essential Chronology of Allegedly Protected Activities

###### (1) Visitor Access Issue

7. In June 1988, a Westinghouse employee named Rust was authorized access to nuclear power generating Unit 1 by one Bailey, who was only authorized to permit access to nuclear power generating Unit 2. When the violation was subsequently discovered, Randlett simply countersigned next to Bailey's name. Moore thought the incident might have been reportable to NRC. Lamb, who was present in the East Gate House at the time, immediately objected to Randlett's action, both to Moore and to Randlett. He also criticized Randlett's decision to Pomeroy, Smith, Neal, Worth, Monteith, and others. (C-16 at 13-14)

8. The incident was a subject of Concern 11881 filed in January 1989, and was part of the notice of that concern subsequently given by Lamb to NRC's Driskill, as described below, in March 1989. The Speakout investigator found the concern "not substantiated," although he recorded that the incident was not optimally handled, and that Randlett did not exhibit good judgment, including with respect to his failure to log the incident. Lamb also discussed the incident with NRC's Beach at a restaurant meeting with NRC officials in Wharton, Texas, on April 22, 1991. The Tobin report, described below, noted the incident, but recorded that it had been investigated internally by STP's Safe Team, which found no evidence of willfully misleading the NRC. The Tobin Report also recorded that NRC reportability criteria were being revised at the time, and were the subject of various interpretations, so that it could not be determined whether the incident should have been reported. The Jordan Report, described below, identified this issue, but treated it as a straight forward

compliance matter that did not require additional analysis. (C-47 at 11; C-49)

(2) The Compensatory Requirements for Lighting Failures Issue

9. In the Spring, 1988, Randlett changed compensatory requirements for lighting failures from posting the entire area to posting only the perimeter with security guards. Dean believed the change did not conform to the security plan. Dean and Lamb objected, but the procedure was changed by Randlett, notwithstanding. Lamb and Dean disapproved strongly, both inside and outside the NSD. This issue was a subject of Concern 11881, filed by Dean with Lamb's input, and investigated by Cink for Speakout, in January and February 1989. It was included in Lamb's referral of Concern 11881 to Driskill in NRC's office of enforcement in March 1989, and discussed with NRC's Beach at the Wharton, Texas, restaurant on April 22, 1991. (Tr. 223-25, Lamb)

10. While Earnest investigated at the site in April 1989, Lamb overheard Earnest tell Randlett that the change in the compensatory procedure for lighting failures needed to be rescinded, but that there were no other significant problems. (Tr. 225-27, Lamb) As a result, although this well identified security issue involved a significant confrontation between Lamb and Dean and Randlett, it did not persist into 1991. This was because after Earnest told Randlett he was wrong, the procedure and related regulatory language were restored by Dean at Randlett's direction, and the concern was apparently resolved to Lamb's and Dean's satisfaction. (C-70 at 0995-97) Because Earnest's inspection was an unannounced inspection and dealt in part with the lighting issue, Randlett could have inferred that the inspection had been provoked by Lamb and/or Dean. This concern was part of the fabric that identified Lamb with protected activity among management and other employees at STP. There is evidence discussed below that Randlett suspected Lamb as the source of Concern 11881, and the cause of the OIG inspection. (Tr. 2532-35, Cink; 1193-94, Randlett)

(3) The Management Key Issue

11. In August 1988, Randlett was told at a Nuclear Safety Review Board meeting to provide senior management with a key to the vital areas of STP so that senior management would not need a security guard on each occasion of entry into a vital area. Randlett first attempted to change the procedure by means of a field change order in October 1988. That failed because the shift supervisor rejected the change as an "intent" change. Then, a formal procedural change was undertaken to obtain approval by the Plant Operations Review Committee (PORC). The Quality Assurance department (QA), then headed by Balcom, and Licensing had concerns with that approach. Randlett added a requirement that Security be called prior to and immediately after using the key. PORC then approved the change, which was made in December 1988. (HL&P-20;

HL&P-158 at 9-11; C-16 at 9-12; C-46; C-47 at 1-2, 3-5; C-49 at 2-5)

12. Lamb and Dean adamantly opposed the change because they believed such a change violated STP's security Plans and Procedures and NRC regulations, which required that access to such vital areas be with "utilization of the security force." Lamb refused to sign the compliance review form. Lamb believed that executing the review form was criminal because it required the applicant's assurance that the change did not lessen security. Moore and Randlett, however, signed the compliance review form. Lamb wrote a memo to Moore, his management superior, and to the file recording his opposition. Lamb also communicated his concerns to Randlett. The issue was included in Concern 11881, and was found by Cink to be not substantiated. (Tr. 179-207, Lamb; 1185, Randlett; C-1; C-16 at 11, and last page) Although others also were involved in the discussions regarding the key issue, and were opposed to the change, Lamb and Dean, were conspicuously opposed to management, especially Randlett, on the issue. Lamb was particularly concerned and vocal, because the issue came within his responsibility. (Tr.A 101-02, Drymiller; 2916, Neal)

(4) The Lockdown Procedure Issue

13. In October 1988 the lockdown was performed on nuclear power generating Unit 2 of STP. A lockdown is an involved technical security check of a generating unit prior to start-up of power generation. Dean and Lamb believed that the lockdown was done in violation of security requirements because new cores had not been installed in the locks and necessary posting of compensating security guards had not been effected to insure that there were no breaches of security during the process. Lamb discussed the lockdown with Moore, who told him that the lockdown had gone as planned, that Unit 2 was secure, and that its status had been reported to the NRC by Randlett. Lamb believed that reporting to NRC that the unit was secure under these circumstances was a Material False Statement under the applicable regulations.

14. This concern was included as a subject of Dean's Concern 11881, which was filed in January 1989, and dealt with in the February 23, 1989, Speakout report by Cink. Lamb gave Concern 11881 to NRC's Driskill in March 1989, and Lamb and Dean discussed this concern with NRC's Beach at the Wharton, Texas, Restaurant on April 22, 1991. Lamb was interviewed regarding the Unit 2 lockdown procedure during the Tobin inspection in early August 1991. The Speakout investigator, Cink, could not discover any written guidelines governing the "lockdown" of a nuclear facility, and so found the concern not substantial. (C-16 at 15-17; C-47 at 6)

15. In December 1988, Dean discussed the management key issue with Kinsey. (Tr. 713-14, Dean) 10. Kinsey testified that he first heard of the key issue in 1989, when the issue came up in a Nuclear

Safety Review Board hearing. Kinsey testified and that he might have discussed the issue with Dean, but did not recall such a discussion. Kinsey was then plant manager. Kinsey's testimony in regard to this issue suggests that he knew Dean and that Dean had routine access to him as a superior in the management chain of authority. Dean reported periodically to him regarding security procedures. Kinsey also testified that, although he was in charge of a thousand employees, he felt comfortable with communicating directly with the NSD managers that worked for his NSD supervisors. Thus, if he needed information, and Randlett was not available, he had no problem in talking with Moore or Hinson, who were NSD supervisors. It was Kinsey's responsibility to be generally informed regarding those departments for which he was responsible, though he professed that he could not know everything. (Tr. 1082-86, 1131-34, 1138-40, Kinsey)

16. The management key issue, as previously noted, was a subject of Speakout Concern 11881 filed by Dean with Speakout in January 1989. Speakout was the internal agency of STP which existed to receive complaints from employees in confidence and conduct confidential remedial investigations resulting in appropriate recommendations. Dean was identified as the "concernee." Lamb helped draft the summary of concerns that Dean filed, but was not specifically identified as a concernee. There is no evidence that Speakout knew of Lamb's drafting role. (Tr. 218, Lamb; HL&P-9; C-78) Dean's summary identified several concerns and explained the reasons for those concerns. In addition to the management key issue, Concern 11881 identified (1) procedures for compensatory lighting failures, (2) the falsification of a visitor's access authorization, which involved an ex post facto authorization of access of an individual named Bailey by Randlett, (3) the validity of Unit 2's lockdown, and (4) Dean's and Lamb's other concerns, which focused also on Randlett's arbitrary style as a manager and his allegedly improper relationship with Earnest. (C-16)

17. Concern 11881 alleged procedural and regulatory violations involving the implementation of the Physical Security Plan at STP, an obligatory licensing document which must be approved and on file with the NRC. (C-16; Tr. 2357, Cink) Cink's Speakout investigation of Concern 11881, which was transmitted to Dean as concernee 11881 on February 23, 1989, found some of the concerns "not substantiated" and, some, "partially substantiated." (C-16) However, even though he had found the concern not to be substantiated, Cink testified that the management key issue was probably the most volatile issue to come out of the NSD during his years at STP. (C-16 at 11; Tr. 2546-47, Cink) William Smith, for example, also testified that he heard about the key issue, and other conspicuous issues identified with Lamb, Dean, Worth, and Neal, although he was in a different department at STP. (Tr. A 183-84, Smith) These issues were revisited two years later in 1991,

when Jordan and the NRC conducted their investigations (Tr. 2545-46, Cink)

18. Within a few days after the investigation of Concern 11881 started, Lamb was transferred from supervisor of Plans and Procedures to supervisor of Systems and Equipment. Lamb considered this transfer to be a demotion at the time. Dean stayed in Plans and Procedures. Lamb believed this was Randlett's retaliation for Lamb's involvement in Speakout Concern 11881. This complaint generated Speakout Concern 11873 filed by Dean in February 1989 with respect to Lamb's transfer. Speakout investigated and reported that the complaint was "not substantiated." (Tr. 219, 222, Lamb; C-15)

19. The management key issue caused Randlett to suspect Lamb of protected activity. Randlett testified that he suspected Lamb had been to Speakout and the NRC, "because some of the issues had been brought up by him [Lamb] previously. And he [Lamb] was still boisterous about some of the issues." (Tr. 1197, Randlett) It may be inferred that in the course of an unannounced inspection on April 10-14, 1989, Randlett told the NRC investigator, who it may be inferred was Earnest, with respect to a contested issue of reportability and a critical assessment by Speakout, then called Safeteam, "It's Dave Lamb and some of his minions giving me a hard time on reportability." Although Kinsey testified that his recall was limited, I find that Randlett told Kinsey that members of his staff were opposed to the change, and that Lamb was accusing Randlett of improper activities in relation to NSD that could send him to jail. (Tr. 1086-90, Kinsey) It also appears that Earnest learned the identity of the confidential sources of Concern 11881 during another security inspection in September 1991, but he denied telling Randlett those names. (C-51 at 11)

20. Randlett testified that he suspected Lamb had been to Speakout and the NRC, "because some of the issues had been brought up by him [Lamb] previously. And he [Lamb] was still boisterous about some of the issues." (Tr. 1197, Randlett) It may be inferred that in the course of an unannounced inspection on April 10-14, 1989, Randlett told the NRC investigator, Earnest, with respect to a contested issue of reportability to NRC and a critical assessment by Speakout, then called Safeteam, "It's Dave Lamb and some of his minions giving me a hard time on reportability." Although Kinsey testified that his recall was somewhat limited, I find that Randlett told Kinsey that members of his staff were opposed to the change, and that Lamb was accusing Randlett of improper activities in relation to NSD that could send him to jail. (Tr. 1086-90, Kinsey) It also appears that Earnest learned the identity of the confidential sources of Concern 11881 during another security inspection in September 1991, but he denied telling Randlett those names. (C-51 at 11)

21. In March 1989, Lamb contacted NRC's Driskill at NRC Region IV and gave him Dean's summary of concerns, which had become Speakout Concern 11881. As previously noted, the concerns, which Lamb adopted and treated as his own, identified the management key issue, the Unit 2 lockdown issue, the changed compensatory lighting requirements issue, the visitor access issue, and the allegedly improper relationship between Randlett and Earnest. Lamb specifically asked Driskill not to refer the matter to Earnest because of his relationship with Randlett, and Lamb's concern that his identity might be compromised. Although Driskill promised action, and made at least two fruitless follow up contacts with Region IV within the next five months, Lamb, as alleged, never got a direct response, and was not advised of the resolution of his concerns. (Tr. 223-28, Lamb)

22. Lamb recontacted NRC's Region IV in March 1991, after the power outage issue arose. He complained about the handling of his 1989 allegations. He was eventually interviewed by both Region IV and OIG personnel. (C-51 at 5-6) This failure by the NRC to respond, including the failure to refer the allegation for investigation until two years later, was faulted in the OIG report which was issued December 30, 1991.

23. The allegation that the alleged's identity was inappropriately disclosed was found to be not substantiated by the OIG's investigation. (C-51) However, when Earnest came to the site for a security inspection on April 12, 1989, Lamb thought he had come to investigate his, Lamb's, and Dean's concerns. In fact, Earnest reviewed the contents of what was then called the Safeteam Concern Investigation Report 11881 file, which did not identify the concernee. He also asked to review the Interviewer file to Concern 11881, which would have identified the concernee, and the Investigation file for Safeteam Concern 11873. Cink avoided the latter request because of its doubtful propriety as to Concern 11881. It appears that Lamb learned of Earnest's interest in the Safeteam reports contemporaneously and was concerned that his confidentiality might be compromised. Later on December 5, 1989, Earnest reviewed all concerns related to issues about the NSD which had been registered after January 1, 1989. (Tr. 227-28, Lamb Tr. 2393-2400, Cink; HL&P 26, 27; C-51 at 8-10)

24. None of Lamb's complaints other than the lighting issue were dealt with by Earnest during his April 1989 inspection at the STP site. (Tr. 227-28, Lamb) This NRC contact by Lamb with Driskill was apparently not disclosed to management at HL&P, nor was HL&P formally notified of NRC's investigation of these concerns. Randlett, however, was aware of at least certain aspects of Earnest's investigation. The OIG found that, despite Lamb's misapprehension, Earnest was not assigned to investigate Lamb's concerns given to Driskill. Those were sent to NRC headquarters in Washington and ultimately determined to allege no violations requiring NRC action. (C-51 at 9-10).

25. Having raised the management key and other issues with management, Speakout, and the NRC, without satisfaction, Lamb and Dean tried not to draw attention to themselves from the middle of 1989, until March 9, 1991, when there was an electrical power failure affecting security equipment. Lamb believed that the power failure was improperly not recognized as such; that it was not reported as required; that failed security equipment was not properly compensated for by posting armed security officers as required; and that required equipment testing after the outage was not performed. Randlett was responsible for those decisions and thus generated the basis for Lamb's conspicuous concern. (Tr. 236-44, 253, Lamb)

(5) The Power Outage Response Issue

26. On March 9, 1991, electrical power failed on STP's security equipment. The power was restored after a short lapse of time, possibly in less than a minute. No functional tests were performed on the intrusion and detection systems after the outage as required by the regulations, because Randlett determined that the loss of power was so brief that it should be considered an "interruption" not a failure or "outage." Relying on this interpretation he did not post the system with security personnel, retest the devices, or report the incident to the NRC. (Tr. 237-43, Lamb)

27. Lamb learned of the power failure the day after it occurred. He asked Moore to investigate why Randlett had failed to post compensation security guards as required when no functional testing had been performed. Lamb believed that the power outage was an event reportable to the NRC, and one that required remedial testing. (Tr. 1187, Randlett) Randlett refused to take the remedial action Lamb thought was required. (Tr. 243-49, Lamb)

28. Lamb, as well as other NSD staff, objected to Randlett's interpretation of the event as an "interruption" rather than an "outage." Lamb with a number of NSD's staff complained to Randlett in his office, but Randlett refused to change his interpretation. Moore testified that most of NSD staff felt that systems should be functionally and operationally tested after each power interruption before unposting the guards. (Tr. 1609-11, Moore)

29. Reacting to that power outage in March 1991, and Randlett's, response to it, Lamb, Dean, and others in NSD discussed going to NRC. In March 1991 Lamb and Dean, Neal, Drymiller, and Worth, with input from others, drafted an anonymous letter to Tapia, the NRC's on site Senior Resident Inspector for STP. The letter alleged wrongdoing at STP by Randlett, particularly with respect to certain power failures and related failures to do compensatory equipment testing and reporting to the NRC. It also alleged an improper relationship between Earnest and Randlett. (C-2 at 35, C-12B at 18, C-88; HL&P-121; Tr. 253-55, 257-58, Lamb; 755,



Dean) Shortly thereafter, perhaps a day or two later, in April 1991 Tapia approached Lamb in the parking lot and asked if he was the author of the letter. Lamb said that he was, and Tapia told Lamb he would be contacted by the NRC shortly. (Tr. 255-56, Lamb) This incident is additional circumstantial evidence of the extent to which Lamb could be, and actually was, readily identified by on site personnel as engaging in protected activities. Tapia had stated to investigators that he believed it was common knowledge at STP that Lamb, Dean, and Worth had gone to NRC with safety concerns in the past. (C-2 at 30)

(6) The Issue of Randlett's and Earnest's Relationship

30. In the March 1991, anonymous letter to Tapia, and the subsequent meeting with NRC officials at the restaurant in Wharton, Texas, on April 22, 1991, Lamb had expressed concern at NRC's inaction with respect to Earnest's preferential treatment to Randlett. Dean and Neal were also present at that meeting. (C-2 at 35; Tr. 253-61, Lamb)

31. Lamb, Dean, Worth and Neal made essentially the same allegations to the NRC's OIG that, when Randlett came to the NSD, Earnest changed his demanding standards and tough style of conducting inspections as the NRC Inspector from Region IV, security ratings improved, and Earnest stopped issuing violations to NSD. The relationship between Randlett and Earnest was suspect as early as January 1989. Randlett and Earnest were old army friends, and apparently consulted informally on various official matters. (Tr. 1192-94, Randlett; C-70; C-16 at 16)

32. When Lamb initially contacted NRC's Driskill in March 1989 about the concerns identified in Concern 11881, he warned Driskill not to refer them to Earnest because of his relationship with Randlett. He complained that Randlett was not taking appropriate action with respect to security violations or properly reporting them to the NRC, and that Earnest was not addressing those omissions properly because of the personal relationship between the two men. Lamb's contact with Driskill was initially futile. Subsequently, the OIG Report censured NRC personnel for the two year delay in taking action on the complaint, and the failure to advise Lamb of the disposition of his complaint. (C-51)

33. Earnest was removed from his inspection duties in late spring 1991, after Lamb, Dean, and Neal made their allegations to the NRC. Hall was alerted to the event by the NRC Regional Administrator. The first inspection conducted by the NRC after Earnest's removal was by the OIG. (C-46, 47; Tr. 2917, Neal; 989, Hall) Contemporaneously, Randlett went to Kinsey and accused Lamb of trying to undermine the NSD. Randlett also suspected Lamb of being the source of the complaint regarding his relationship with Earnest. (Tr. 1192-94, 1196-97, Randlett) Randlett later testified that he was not surprised by the terminations of Lamb and Dean

because they caused headaches for management at STP. (Tr. 1198, Randlett) Moore also testified that the concerns that Lamb and Dean had been raising had been causing management problems for years. (Tr. 1559, Moore) This testimony is evidence of Lamb's and Dean's wide visibility and association with ongoing issues.

#### (7) The Damaged Security Door Knob Issue

34. In March 1991, the Security Computer Room door knob was discovered in severely damaged condition. Hinson ordered that the matter not be logged or reported. Lamb believed it was a reportable event. Lamb was involved because the door was part of the security system for which he was responsible. (HL&P-13 at 56; Tr. 249, Lamb) It is not clear whether Lamb took the issue to Speakout in March or April, 1991, or whether Worth took the matter to Jordan and Speakout's Cink in June 1991 as part of Jordan's investigation into NSC's problems. (Tr. 2180-81, Jordan; HL&P-13) This event was noted in the Tobin report, but the concern was determined to warrant no further effort because the perpetrator could not be identified and no actual or attempted breach of security was established. (C-47 at 21, 51) Nevertheless, the issue was a cause for Lamb's conspicuous concern, and the fact that it was directed not to be reported made it a conspicuous issue in contention between Lamb and management.

#### The Subsequent Investigations and NRC Contacts

35. After Lamb's contact with Tapia, Beach of NRC's Region IV contacted Lamb and invited him to meet on April 22, 1991, with NRC Region IV investigators Beach and McLean at a restaurant in Wharton, Texas, to discuss problems in the NSD and the allegedly improper relationship between Randlett and Earnest. (Tr. 258-260, Lamb; HL&P-121) Lamb was joined by Dean, Neal, and Gregg. Drymiller had met with these NRC personnel earlier in the day. (Tr. 104, Drymiller) At the meeting Lamb discussed the power outage and concerns incorporated in Speakout Concern 11881 given to Driskill in March 1989, as well as other recent power failures, the doorknob incident, and relations, between Earnest and Randlett. He expressed concern that NRC had not acted regarding Earnest giving preferential treatment to Randlett. (Tr. 258-60, Lamb; C-12B at 18; HL&P-121)

#### The OIG Investigation

36. In May 1991, Jump, manager of STP's Licensing warned Jordan, General Manager of Nuclear Assurance, of an imminent inspection of the NSD by the OIG of the NRC in June. The Quality Assurance department (QA), then managed by Balcom, was under Jordan's jurisdiction and included consolidation of audit and assessment functions with quality engineering. Jordan's jurisdiction also included Speakout. Jump advised Jordan that the OIG would investigate NSD in June, and that Jump was coordinating

for the OIG. The OIG investigates allegations of misconduct by NRC employees, but the scope of the investigation could extend to relevant conduct of a licensee. (Tr. 2154, Jordan) In June 1991, Hall was notified by Martin of NRC that Earnest was being removed as inspector at STP pending an investigation.

#### HL&P/Jordan Investigation

37. Hall anticipated a related investigation of STP as well. (Tr. 989, Hall) Jordan, with the assistance of HL&P's regulatory counsel was assigned by Hall to conduct HL&P's investigation into the concerns of the OIG. This was the first step leading to what is referred to as the Jordan Report. (Tr. 1019-20, Hall; 2141-42, 2155-56, Jordan) Jump and Jordan assumed that the OIG would investigate allegations that Earnest gave preferential treatment to Randlett. Jump wanted Jordan to identify security problems under Randlett, and to ascertain what significant issues were unresolved. (Tr. 2141-42, Jordan) Hall asked Jordan to ask Speakout whether there were any issues which would concern the NRC. (Tr. 2141-42, Jordan) Jordan contacted Cink, his senior Speakout investigator, to ask if there were any outstanding issues in the NSD that might be controversial enough to lead to an NRC investigation.

38. Cink advised Jordan of several issues, including those raised by Speakout Concern 11881. (Tr. 2141-43, Jordan) Cink knew that the management key issue was still volatile more than two years after the original Speakout investigation. (Tr. 2253, Jordan) Cink also identified Randlett's action regarding visitor access. Cink retrieved copy of 11881 from archives, which Jordan studied. Jordan reviewed Security issues that QA had audited, including the management key issue, with Monteith of QA and Cink, and then reported to Jump. Jump had list of people from the licensing lawyers that the OIG wanted to interview at STP. Jump was to coordinate interviews. Planning was undertaken to deal with the OIG inspection and for debriefing of consenting STP personnel who were to be interviewed on June 20, 1991. Lawyers arranged with Jump, with approval of the OIG, to debrief each consenting interviewee. Jordan had identified most significant issues in dispute in Security during Randlett tenure during the summer of 1991. (Tr. 2142, 2190-94, Jordan; HL&P-112; HL&P 130)

39. The OIG investigated allegations regarding the allegedly improper relationship between Earnest and Randlett and related issues at the STP site beginning on June 17, 1991. The investigation was precipitated by the concerns expressed to Tapia in Lamb's and Dean's anonymous letter. (Tr. 260, 989, Lamb; C-2) The OIG interviews included Randlett, Lamb, Dean, Cink, Drymiller, Sheesley, Neal, Moore, and others. The OIG interviews ended June 20, 1991. The investigation, however, apparently continued, at least formally, until December 1991. (C-2 at 35) The formal report, which was directed to internal addresses and does not

reflect distribution to HL&P or others outside the NRC, was dated December 30, 1992. (C-51)

### The Debriefings

40. At the debriefings Lamb and Dean disclosed to Jordan and Gutterman some, but not all, of the information they had given to the OIG investigators. All but one of these persons interviewed by OIG agreed to be and were debriefed by Jordan and Gutterman. (Tr. 2156-57, Jordan; C-70) These debriefings were essentially mandatory. (Tr. 266, Lamb; 990, Hall; 2156, Jordan) HL&P contends that the purpose of the debriefings was to identify the issues being investigated so that HL&P could make sure that the OIG received complete information, and that any continuing deficiencies were corrected. (Tr. 2155-56, Jordan; Respondent's brief at 50) In the course of the debriefings, as well as from other sources, Jordan learned that Randlett was distrusted by many. (Tr. 2162-64, 2199-2202, Jordan)

41. Lamb's debriefing by Jordan, Gutterman, and Nancy Ranek on June 17, 1991, followed his interview with the OIG. That debriefing makes clear that Lamb voiced a variety of concerns to NRC investigators that he was not prepared to disclose to the debriefers because of concerns as to how HL&P would react. He did elaborate on the Earnest-Randlett relationship. He also identified a number of what he considered security violations that he had discussed with NRC, including the management key issue which he believed involved a violation of NRC regulations. Lamb indicated to the debriefers that the failure to report the security incidents cited in the Speakout report to NRC concerned the investigators greatly, but declined to elaborate because of concern as to how HL&P would respond. Lamb opined that the OIG would probably refer some issues related to Randlett's behavior to NRC's Office of Investigations for follow-up. (C-70)

42. At his debriefing Dean expressed opinions consistent with his expressed concerns elsewhere. Apparently, he did not reveal any prior communications with NRC. Like others debriefed, Dean apparently discussed a number of particular and contentious, but selected, security issues with NRC during the investigation, and disclosed this to the debriefers. (C-70 at 0995-99)

43. In the debriefings following the OIG inspection, Jordan and Gutterman learned from Cink that Randlett thought Lamb was the concernee behind Speakout Concern 11881 which had caused the investigation. (Tr. 2532-35, Cink) Cink's testimony in this regard is another example of the inductive reasoning process by which an inside observer would have come to an awareness of Lamb's identity as a whistleblower without having been directly informed by someone.

44. Jordan and Gutterman also learned from the briefings that Lamb, Dean, Neal, and Worth all alleged an improper relationship between Randlett and Earnest to the NRC. Drymiller indicated that a close personal relationship, including consultations on technical decisions, existed between Randlett and Earnest. Dean described the relationship as extraordinarily "chummy," though he did not cite specific improprieties. On the other hand, Sheesley indicated in detail that the proprieties had been maintained punctiliously. Jordan and Gutterman also learned from the debriefings that Lamb and Dean discussed the management key issue with the NRC. (C-70) Jordan discussed the debriefings with both Hall and Kinsey. (Tr. 2275, Jordan)

45. The OIG left the STP site on June 20, 1991, informing the licensing lawyers, of which Gutterman was one, that several technical issues would be investigated by a technical arm of NRC. Jordan, Randlett, and others were so advised by management. HL&P, however, contends that it did not know the results of the OIG investigation when it terminated Lamb and Dean. (Tr. 1042, 1066-67, Hall; 1454, 1487-88, Balcom; 2281, Jordan; Respondents brief at 49) Randlett testified that he did not know the results of the OIG investigation when he resigned. (HL&P-158 at 43-44, 52) If HL&P did not know the formal results of the report in detail or in writing, its managers nevertheless would have had a reliable general indication of most of the OIG's concerns from Jordan's investigation, the debriefings, the exit interview, and the general process of responding to an important investigation. It was not in OIG's interest to conceal from HL&P and its managers deficiencies and needs for remedial action identified by such an investigation.

46. The OIG Report dated December 30, 1991, reflects wide ranging observations by Lamb to NRC personnel, including observations regarding an allegedly improper relationship between Randlett and Earnest and related security violations. The issues discussed were in many cases those same issues that Lamb had been raising for several years. (C-51) HL&P contends that the OIG Report did not substantiate the charge that Earnest did any favors for Randlett or HL&P. HL&P also disclaims management knowledge of any connection between the grievance which Earnest filed in November or December 1991, and the OIG investigation. NRC's Region IV management had contacted Hall regarding the possible grievance action by an NRC inspector at STP, and an inference could reasonably be drawn that someone in the NSD had complained to the NRC regarding the inspector's conduct. (Respondents' reply brief at 4; Tr. 1072, 1077, Hall; Tr. 1519-22, Moore; C-2 at 36) Although the written report of December 30, 1991, was apparently not served on HL&P management, HL&P's disclaimer of knowledge of the connection between the grievance and the OIG investigation, or the investigation and an NSD complaint regarding the inspector is not credible, because of the timing of Earnest's suspension, of which Hall and others were informed, the known scope of OIG

inspections, and the extensive contemporaneous investigation and debriefings by HL&P.

47. Randlett testified that he suspected that Lamb was behind the investigation, and that it was Lamb, "Or someone he put up to" making the allegations of an inappropriate relationship between Randlett and Earnest. (Tr. 1192-94, Randlett) Randlett also admitted going to Kinsey on at least two occasions "[t]o talk about what [he] perceived as Mr. Lamb's effort to undermine the Security Department." He admitted naming Lamb, and that he suspected that he or one of his subordinates had been to Speakout on some of the issues, because he had previously brought up some of the issues and "he was still boisterous about some of the issues." (Tr. 1196-97, Randlett) Kinsey confirmed that these conversations took place around the summer or fall of 1991, when the investigations were in progress. He described Randlett as very upset and desirous of terminating Lamb, because Randlett had heard from industry contacts that Lamb had said he was going to get Randlett fired, and that Randlett would go to jail. Kinsey testified that he declined to take action based on such rumors. He testified that he could not recall if there was mention that Lamb was behind any of the investigations, or that Lamb had contacted Speakout or the NRC, but he testified that it would have made no difference. (Tr. 1141-44, Kinsey)

#### The QA Audit

48. In addition, a scheduled QA annual audit of NSD was begun on July 6, 1991. Balcom, as head of QA, reported to Jordan that Randlett was intransigent on several issues. Balcom recommended that issues be identified and reserved for resolution by Licensing and NRC. Jordan approved. The QA exit meeting on August 6, 1991, was attended by Jordan, Jump, Balcom, Randlett, Kinsey, Hall, Tobin, and others. Balcom testified, "The audit [of NSD] covered everything, so it would have had to have covered everything that the Tobin report also looked at.: "Some of those areas" were "the same areas that we've seen that Mr. Lamb and Mr. Dean were raising their concerns about." The QA audit reviewed the management key issue, among others with which Dean and Lamb were concerned. Discussion of the sources and solutions of these issues would by inference have involved Lamb and Dean, because, among other reasons, they almost inevitably could be expected to be concerned with any inappropriate responses to their previously expressed concerns. Although he professed to have "had no preconceived ideas of the people who worked in [NSD]" when he came to the department, Balcom testified that he had formed an idea from QA audits of how the NSD staff had performed "[a]s a unit." But Balcom denied seeing Lamb's and Dean's opposition to Randlett on issues within the scope of the QA audit and Tobin report, "because [t]he audit didn't focus on particular details like that. What the audit focused on was issues or problems within the department as a unit." (Tr. 1210-11, Balcom)

### The Tobin Inspection

49. On August 6, 1991, the nine day NRC inspection of NSD directed by Tobin began. It was conducted by a team of inspectors from NRC Regions II, III, IV. The Tobin inspection was a special team inspection which was undertaken because the NRC had developed some special concerns about security matters at STP. (Tr. 965-66, Hall) Their purpose was a follow-up inspection to address interpretive technical issues raised by NSD staff. (Tr. 2159, Jordan) Some of these issues were developed by the OIG investigation. The inspectors investigated the management key issue, the power outage issue, the Unit 2 lockdown issue, and other issues that Lamb and Dean had been raising since 1988. (Tr. 1509, Moore) The Tobin Inspection Report notes that STP's Nuclear Quality Assurance Department and Speakout Team were currently investigating several physical security issues and that the Tobin inspection was curtailed so as not to interfere with that ongoing internal self-assessment process. (C-46)

50. The Tobin inspection continued on site until August 15, 1991. Hall, Jordan, Jump, Kinsey, Monteith, and Randlett were among those who were interviewed by the inspectors. Inspectors interviewed Lamb about technical issues he had raised before: the management key, Unit 2 lockdown, and the power outage. At a standard exit interview on August 15, 1991, the inspectors discussed tentative findings, including the identification of three violations, with senior management, which included Hall, Kinsey, Randlett, Jordan, Jump, and others. A written report was to follow. The written notice of violation was dated November 5, 1991. (Tr. 261, Lamb; 2159, Jordan; C-2 at 35; C-46, 47)

51. Lamb was not present at that Tobin inspection exit interview. He believed he was identified as a cause of all the problems NSD was having with NRC, and he believed that he was given the cold shoulder afterwards by HL&P management. After the exit interview Kinsey would not speak to him as before. Randlett would have meetings about Lamb's systems and exclude Lamb, but include Moore and one of Lamb's staff. (Tr. 308, Lamb)

### The Jordan Report

52. After additional issues arose in relation to the OIG investigation in June 1991, the QA audit in July-August, and the Tobin inspection, Hall instructed Jordan in mid-August to identify every disputed "interpretive issue" which was dividing NSD from Speakout, the OIG inspection, the QA audit, and the Tobin inspection, and to implement a procedure to frame each issue in terms of regulations and Physical Security Plan. Hall wanted positions on each issue by QA, Licensing, and NSD to be reviewed by Hall for approval, together with a proposal to resolve each issue permanently, including referral to NRC Senior Resident and NRC Region IV and, if necessary, Washington. Hall specifically wanted

to have the ultimate HL&P responsibility for deciding HL&P's position, and to have NRC's review and approval of HL&P's planned resolutions. These instructions established the scope of the Jordan Report, whose preparation and review involved Hall, Kinsey, Jordan, Randlett, and other STP managers and supervisors. (Tr. 961-66, Hall; 2186-92, 2208-11, Jordan; HL&P-158 at 64-67, Randlett; HL&P-112)

53. Jordan worked with Randlett, Jump, Monteith, who was the Quality Assurance Auditor, and thus in Balcom's department, and Cink to identify the issues, alternative positions, and the applicable NRC requirements. They developed a position paper on each issue for management review. HL&P contends that they did not focus on the identities of personnel who disagreed with Randlett. Jordan testified that it was not part of his process to identify people who had made reports of safety concerns, but that, in identifying the issues through the debriefings, through Speakout, and other sources, "[a]t one time or another, just about every name of every staff member within the HL&P security organization came to [his] attention as being involved in one of the issues or another." Jordan testified that he did not, in reporting his progress to Kinsey and Hall, report the names of individuals involved. (Tr. 2190-91, 2199, 2247-50, Jordan) Jordan's focus, HL&P contends, was to ensure that interpretations were thoroughly reviewed and approved by top Project management and by the NRC, so that they could be resolved. (Tr. 965-66, 1020-21, Hall)

54. The positions taken in Jordan's report "were fairly well finalized" by late September, but, because the authors anticipated that the Tobin report would take at least some contrary positions, particularly with respect to the management key issue, Jordan held off finalizing the issue papers until they could see the actual in print position of the Tobin inspection team. (Tr. 2209, Jordan; C-49) Jordan shared the issue papers as they developed with Kinsey, and Randlett expressed his views to Kinsey regarding the correct responses to the issues, in order to get Kinsey's "agreement or disagreement on them," although Kinsey was not actually a member of the task force. (Tr. 1148, Kinsey) Jordan's report was still in process in early November when Tobin report arrived. I infer that Lamb and Dean would have been identified in the normal course as proponents of significant interpretations which were in issue and contrary to management positions, especially as to those issues which were in contention within STP vis-a-vis NRC.

#### The Tobin Report

55. The Tobin Report was issued in early November 1991, and was sent to management of STP on November 5, 1991. Jordan wanted to reconcile STP's positions with the NRC's positions taken in the Tobin report. Jordan, Jump, and Randlett, after initial reluctance on the part of Randlett, agreed on positions that could be taken to Hall. (Tr. 2204, Jordan; C-49) Randlett locked up the report, and



denied anyone access to it except Hinson and himself. (Tr. 306, Lamb). At that point, according to Lamb, Randlett began to display his hostility towards Lamb openly. (Tr. 308, Lamb) Nevertheless, it became known that NRC found violations of security with respect to the management key and power outage, and the failure of backup diesel generator to start when tested by Tobin during the inspection. Lamb believed he was responsible for all three violations and that management believed it and disapproved of his actions. It is not disputed that he was involved to some extent in the first two.

56. The Jordan report, whose subject was "Interpretive Security Issues," stated, "In accordance with your instructions, Nuclear Generation, Nuclear Licensing and Nuclear Assurance have compiled issue papers regarding interpretive matters within Security, Security/QA, and those subject to current investigations." (C-49) Hall approved Jordan's recommendations contained in the report. Thereafter, Jordan and Jump discussed those recommendations with Tapia of the NRC. (Tr. 2205-09, Jordan)

57. The Jordan Report identified a number of security issues raised in connection with four identified arenas: the NRC OIG Investigation, the Nuclear Assurance security audit, which was conducted by QA, the Speakout investigation of security concerns, and the August 1991 NRC special inspection of security issues, referred to as the Tobin inspection. (C-49) The Jordan Report treated a number of issues, of which the management key issue and the power outage issue are most significant. Hall and Kinsey testified that the key issue was especially significant because substantial resources and time had been committed to dealing with the issue. (Tr. 1139, Kinsey; 986, Hall)

58. Lamb and Neal got copies of the Tobin Report from NRC in January or February 1992, because they were the allegeders. (Tr. 308, Lamb) Lamb testified that in response to his request, Balcom gave NSD personnel access to the Tobin report. (Tr. 615, Lamb) Prior to that time Lamb and Neal advised Balcom of certain inaccuracies in the Tobin Report after Balcom had taken over NSD. Balcom regarded two of the inaccuracies as insignificant, but agreed to investigate the circumstances relating to Dean's mishandling Safeguards material further. (Tr. 3122-13, 681; C-55; HL&P-48) Lamb believed that Balcom must have inferred from Lamb's knowledge of the content of the Tobin report that he was the instigator of the investigation. (Tr. 615-16, Lamb)

59. The Tobin report identified three Level IV violations, two of which related to the management key issue, and the power outage issue. Lamb and Dean had raised the first of these approximately two and a half years before, and the power outage issue the previous March. (C-46, 47; Tr. 1509-13, Moore) The third violation involved the failure of a backup diesel generator, which did not directly involve Lamb or Dean. The notice of violation was

issued over the signature of Beach, who had interviewed Lamb and Dean at the Wharton, Texas, restaurant in April. (C-47)

60. HL&P contends that the Tobin report focused on resolving issues raised by the various NRC and HL&P reviews of STP security, not individuals, so that HL&P did not attribute the reduced SALP (Systematic Appraisal of Licensee Performance) score to the Tobin inspection or to actions by Lamb and Dean. (Respondent's brief at 49; Tr. 954, Hall) However, Hall, as Vice President-Nuclear, testified that he attributed the decline between 1990 and 1992 in the SALP ratings to violations imposed on STP by the NRC in the Tobin report; and that there was no question in his mind that the key issue and the power outage issue affected HL&P's ratings. (Tr. 956-61, Hall) Moore likewise testified that he believed the violations issued as a result of the Tobin inspection contributed to reduced SALP scores and reflected negatively on him as a manager. (Tr. 1575, Moore) If, as HL&P suggests, HL&P did not learn of the lowered SALP score until October 1992, well after the reorganization, the reduction, nevertheless, could have been anticipated under the circumstances. (HL&P Reply Brief at 5; Tr. 1616-22, Moore; HL&P-110)

61. It was generally known that STP wanted to avoid reportable events, because reportable events indicate that the system is not functioning well. That attitude was well known in the NSD. (Tr. 2057-08, Pomeroy; 2955, Neal) Hall testified that management at STP tried "within management propriety" to avoid Tobin-type inspections, which were special team inspections, rather than normal routine inspections. (Tr. 966, Hall) STP management strove for the best SALP ratings possible, in order to decrease the work load and associated costs generated by more frequent NRC inspections. The violations which the Tobin team issued, and which included the management key and power outage issues, led directly to a reduction of the NSD's SALP rating from 1 to 2. (Tr. 960-61, 965-66, Hall; C-46, 47) Although Hall testified that his concern in response to a Tobin-type inspection was to identify and resolve issues, not to identify individuals who were generating the allegations, I find that the identity of responsible personnel involved with identifying the issues would inevitably be linked with the proper assessment and solution of those issues, and that the categorical disclaimers of knowledge in this regard as to who those persons were not credible.

62. The management key issue was one of those issues identified by Jordan at Hall's behest for permanent resolution shortly after the Tobin assessment provided at the exit meeting August 15, 1991. Jordan reported his findings to Hall at several meetings in early December 1991. After the Tobin Report had been received, the issues papers were finally completed, and Jordan gave the written report to Hall around December 6, 1991, for review and approval. (HL&P-112; Tr. 2186-92, 2208-11, Jordan; Tr. 962-63, Hall) HL&P contends, incongruously, that when the Tobin report was

received in November, it did not occasion significant management attention, even though completion of the Jordan report had been deferred to allow reconciliation of its recommendations with the findings of the Tobin Report. (HL&P-158 at 64-67, Randlett; Tr. 2204, 2209, Jordan; C-49)

63. On February 21, 1992, Balcom, Jordan, Jump, and Kinsey met with NRC personnel from Region IV and Washington, D.C. at Region IV Headquarters in Arlington, Texas. The agenda was the Jordan Report, which had been forwarded by Tapia, NRC's Senior Resident Inspector at STP, to Region IV, and included the management key issue and its resolution, among other matters, which had been of concern to Dean and Lamb and HL&P. The pending issues apparently were resolved between HL&P and Region IV and the Washington representatives of the NRC. Balcom was thus directly involved with the final resolution of these contentious issues while he was planning the reorganization of NSD.

64. Tracing the management key issue demonstrates the clear definition of the issue, its durability and persistence, the repeated interaction of STP and NRC personnel that it generated, as well as the inextricable involvement of Lamb and Dean with the issue. Their involvement was so substantial and sufficiently conspicuous as to make management's categorical denials of knowledge of that involvement incredible.

#### The Dean-Sheesley Incident

65. In October 1991 a confrontation between Dean and his supervisor, Sheesley, over work assignments occurred. Sheesley accused Dean of threatening him. Dean was sent home, and Human Resources investigated. During the investigation, Moore learned that Dean had been to Speakout. (Tr. 1630, Moore) Moore recorded in a note to the file that Dean had stated that in the two and a half years since he and Lamb had been to Speakout there had been an effort to chase them both out. He recorded that Dean had expressed concern as to the eventual response of the regulators regarding "events that were in violation of federal law," and "that he had discussed these issues with the then Plant Manager and now Vice President of Nuclear Generation and Mark Wisenburg." He also recorded that, "Taylor asked Dean if he was saying that there was a conspiracy involving Warren Kinsey, Mark Wisenburg, Bill Randlett, Rex Moore and Dave Sheesley to hide things that were wrong at STP. Dean replied that he had been harassed for trying to protect the company. He stated that the harassment went no higher than Randlett and that Moore had been bypassed. Dean said that Sheesley had dealt directly with Randlett on a lot of matters. Dean restated that the purpose of the meeting was to force him to resign." (C-9 at 132)

66. Human Resources completed its investigation of the incident in November 1991, concluding that Dean had not threatened

Sheesley. Dean was given a one day "decision making leave" after approximately one month off work. (C-9) The documentation of the Dean-Sheesley incident was prepared with due regard for possible litigation. (Tr. 999, Hall)

67. In mid-November 1991 Kinsey wrote an undated confidential office memorandum to Hall, which was explicitly approved by Hall, responding to a recommendation of the "Human Resources Department, in consultation with our lawyers," regarding the Dean-Sheesley incident. Kinsey observed that "[t]heir recommendation took into consideration that Mr. Dean was included in the Inspector General's investigation and that Mr. Dean indicated, during his interviews with Human Resource Department personnel, that Security Department management were retaliating against him. The lawyers are concerned that Mr. Dean will file a 210 if we take strong action on this issue." Kinsey went on to note that he had reviewed the facts and consulted with Jordan in making his recommendation for "Decision making leave." He closed, stating, "Both Tommy Jordan and I feel that if Mr. Dean does file a 210 this course of action will be viewed favorably. Your approval to proceed with this disciplinary action is requested." (C-9 at 113)

68. At the hearing Kinsey did not recall his use of the word retaliatory, but he admitted learning that Dean thought he was being retaliated against, that Dean had been to Speakout some two and a half years before, and that Dean had talked to the NRC or the OIG in the summer of 1991. (Tr. 1120-21, Kinsey) Ultimately, Kinsey, in consultation with Jordan, made the decision to put Dean on decision making leave, based, he said, on Dean's previous work history, and the conclusion that he did not mean to threaten Sheesley, but that he had engaged in nonprofessional conduct. (Tr. 1165-70, Kinsey) The memorandum shows the interaction of STP management, its exchange of information, and its general awareness that Dean professed he had engaged in protected activity, and was concerned about retaliation because of it. The memorandum manifests an alert and explicitly cautious response, tempered by legal advice, to Dean's sensitivities and concern with the possibility that he might file a whistleblower claim.

69. In October and November 1991 Randlett completed the 1992 budget and organizational structure, reflected in an organizational chart which identified personnel and their positions, based on operational need and job functions for the NSD, although possibly slightly in excess of the earlier T. B. Martin Report's recommendations. (Tr. 1189-90, Randlett) Randlett's proposals were submitted to Kinsey and Hall and approved by them.<sup>6</sup> Later in

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<sup>6</sup>According to Hall, the 1992 budget was submitted to him in draft in September 1991; it was reviewed in October; presented to the budget committee the first week of December; and finally approved by the HL&P board of directors in January 1992. (Tr. 1069,

November or December, Randlett announced at an NSD staff meeting that the 1992 budget had been approved, and that, notwithstanding a reduction in force which had been implemented at HL&P, there would be no layoffs within the NSD in 1992. (Tr. 1188-91, Randlett; 1069, Hall; 1222, Balcom) Kinsey, who was Vice President, Nuclear Generation, advised NSD personnel almost contemporaneously that the STEP competitive ranking procedure used elsewhere in HL&P for reductions in force would not be used at STP. (Tr. 1946, Lala; 1080, Kinsey)

70. The Tobin report issued November 5, 1991, after the August 1991 on site inspection by the NRC observed, "within the Nuclear Security Department are adequate numbers of supervisors, managers and coordinators for such tasks as compliance, procedures, operations and equipment." (C-47 at 12)<sup>7</sup> The Tobin report also referred to the Nuclear Quality Assurance Audit relating to the annual audit in August 1990 which had concluded that the Program was adequately staffed. By implication, NSD was not significantly overstaffed. It also noted that the current QA audit had identified issues relating to differences with the Security Manager on reporting/logging criteria and the adequacies of compensatory posts. (C-47 at 12-13) I find that budgetary considerations were not a significant incentive for Balcom's reorganization of STP.

71. Jordan gave a written report (the Jordan Report) to Hall in early December after several meetings with Hall concerning his findings on issues involving the NSD. Jordan recommended replacement of Randlett to Hall and Kinsey because of Randlett's deficient management style. Randlett resigned and departed from HL&P in early January 1992. Although not conceded by HL&P, had he not resigned voluntarily, he would probably have been forced to resign. Certain of his professional conduct had been characterized as inappropriate and investigated. He was widely perceived as a deficient administrator, tending to be arbitrary and a poor communicator in his dealings with subordinates. Kinsey had tried unsuccessfully to coach Randlett to improve upon his management style. Though he had not asked Randlett to leave, Kinsey apparently had Randlett's confidence, and encouraged him to seek employment near his family in the East when Randlett disclosed that he was considering the possibility. (Tr. 2302-08, Jordan; 1144-47, Kinsey)

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Hall)

<sup>7</sup>Randlett testified that he was not familiar with the Tobin Report, which he believed erroneously had been issued after he left STP. He believed he had seen it and was not pleased with it. (Tr. 1189-91, Randlett)



#### Randlett's Departure; Balcom's Appointment to NSD

72. Kinsey advised Jordan that Randlett was leaving in early January 1992. It was his responsibility to find a replacement for Randlett. He asked Jordan and Jump for recommendations for a replacement. They recommended Balcom, a manager in the Quality Assurance department of STP and former Navy chief petty officer, who was recognized as a tough, decisive, effective administrator, experienced and knowledgeable in his field. Balcom had worked in the nuclear power field for twenty-five years, fourteen in the nuclear industry. However, he had no background in nuclear security with which the NSD was concerned. His background was in operations and, after 1987, nuclear assurance, as director of quality assurance (QA), which was an oversight function of all the programs and processes at STP. In that position he became aware of problems in the NSD. From 1990-91 he also became acting manager of Speakout, as an auxiliary duty, with Cink working under him as an investigator. (Tr. 1205-11, Balcom) Thus, Balcom was in a position over a substantial period of time to be familiar in detail with problems, issues, and personnel in NSD.

73. In January 1992 Kinsey recommended Balcom to become Manager of NSD. Though he would have liked to promote from within NSD, "[i]t was [his] judgment that the top two members of that department at that time were not capable of managing that department." Kinsey was looking for an organizer, a management type person who could communicate well, "and set up a teamwork environment." He knew Balcom, who had worked for him in the past, "pretty well," and had a good working relationship with him. Kinsey was helped in that selection process by Jordan and Jump, who also favored Balcom. Hall questioned the appointment because Balcom had no nuclear security background. Kinsey persuaded Hall, and Balcom was appointed. (Tr. 1010, Hall; 1149-51, Kinsey) HL&P strenuously denied that Balcom was a "hatchet man," or was perceived as such, as alleged by Complainants. (Tr. 1070-71, Hall; 1440-45, Balcom; Respondent's brief at 51) It was thus clear that Kinsey was thoroughly familiar with the personnel and the department with which he was dealing.

74. Kinsey advised Balcom that Hall had decided to move him from Director of Quality Assurance to Manager of Nuclear Security. Balcom came to NSD less than a week later on January 7, 1992, to observe NSD while still running QA. Randlett lingered for approximately ten days to help Balcom with the transfer. (Tr. 1211, Balcom) Balcom attended all staff and other meetings in both departments during transition. Both NSD and QA were on the same floor. Balcom observed a lack of supervisors' input at Randlett's staff meetings, and noted Randlett's deficient managerial style. He testified that sections operated with jealous independence: Drymiller, as supervisor of Operations and Training; Sheesley, as supervisor of Plans Screening and Safeguards Information; Lamb, as supervisor of Systems and Equipment; Hinson, as Division Manager of

Investigations and Compliance; Rex Moore, as Division Manager of Security Support. He undertook a comprehensive personal evaluation of NSD over the next four months. His one acknowledged specific directive from higher management, which he got from Hall and Kinsey, was to focus the NSD on the physical security of STP. (Tr. 1221-23, Balcom)

75. HL&P maintains that Balcom was selected to improve administration of NSD, and that Hall told him to focus it on maintaining the physical security of STP. Balcom testified that one of his primary objectives was to bring a disciplined or structured approach to resolving interpretive issues that involved employee or staff disagreements with management decisions on various technical issues within NSD. Balcom was obviously familiar with these "interpretive" issues. These were issues that involved Lamb and Dean, who, Balcom could assume and could hardly ignore, were concerned that management was violating applicable regulations. (Tr. 1329-34, Balcom)

#### The Reorganization of NSD

76. Kinsey told Balcom that Hall wanted NSD tightened up and to concentrate exclusively on physical security of STP. He wanted to move access authorization out of NSD and into HR or Licensing. The change was a year overdue under Randlett. (C-75C at 1-4; Tr. 1152-53, Kinsey) Balcom's transfer date was January 22, 1992, but transition was to start immediately. While Balcom denied that Kinsey had told him to "reorganize" the NSD, when he testified, that testimony was contradicted by Kinsey's statement to the NRC, "I had the present manager, Richard Balcom, further explore the possibility of a reorganization," and, "I was involved in the decision making processes with respect to the recent reorganization of the nuclear security department at STP." (Tr. 1221, Balcom; C-75b)

77. On January 22, 1992, Balcom was installed as director of NSD. He disclosed his intent to completely reorganize the NSD in March. Balcom knew about the OIG investigation and the Tobin inspection. Balcom and his staff in QA worked on regular basis with NRC. Balcom testified that during January and February 1992 he interviewed all personnel in the NSD, seeking information about NSD, its personnel and operations, and their views. He reviewed their files. He sought to identify "things that impeded communication, teamwork and the organization functioning as a whole." He assiduously avoided discussing any of the employees that were going to work under him with Randlett. (Tr. 1213-16, 1383-84, Balcom) Balcom testified that he kept his own counsel, and kept all his information in his notebook computer, not on paper. He testified that in the course of his investigations he did not divulge his findings or conclusions to anyone. He explained that this was necessary to avoid rumors and their adverse consequences. (Tr. 1224-25, Balcom) He observed Lamb and Dean work



during those first few months. As to their work ethics, he testified, "I wouldn't say that I have no criticisms. I took no disciplinary action, and I identified no particular, what I would call performance problems that I felt needed to be directly dealt with, with relation to either one of those." During this period he developed no criticism of their work ethics "that [he] documented, or anything like that."<sup>8</sup>

78. Balcom's personality, competence, experience at STP, and methodology were such that he could not have avoided becoming thoroughly familiar with the issues which had affected the NSD's administrative efficiency and morale. He would have gained knowledge of the individuals who were concerned and between whom the problems existed. Given the extended time period, and the professed care and attention to detail that he employed in investigating the situation and forming his own opinions about the seventeen or so employees in NSD, he would have discovered how they interacted with each other. He would have learned what issues had continuing vitality, and had involved the NSD in investigations by the NRC, as well as internal investigations. Such issues would have had to be dealt with in any reorganization of NSD. At least some of the issues could be readily traced to Lamb's differences with Randlett, most of which would have involved Dean. I find that Balcom, having gone through extensive interviews with the NSD personnel, including Lamb, Dean, Neal, and Worth, would have learned that they had opposed management on the particular issues in question, because of the investigations by NRC, and intra company interactions between personalities. I also find that he would have come to suspect, even if he did not know to a certainty, "in all probability that they had been to both Speakout and the NRC" as Claimants allege. (Claimants' brief at 12)

79. In February 1992 Balcom decided to reorganize NSD, and solicited ideas regarding structure from Moore and Hinson, but did not disclose his plans for NSD. (Tr. 1221-23, 1226-27, Balcom; C-

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<sup>8</sup>When pressed as to criticisms that he "just didn't document," Balcom answered, "During that period, I was evaluating everybody in the department. I obviously formed some opinions and some things that I would have liked to have changed. I wouldn't necessarily call those criticisms. I wouldn't necessarily call those performance issues. I would call those things that needed to be worked on to make that department function. There were things with Mr. Lamb. There were things with Mr. Dean. There were things with just about everybody in the department, because I was evaluating." (Tr. 1216-18, Balcom) I find that Balcom, in effect, was admitting that he had developed a quite detailed perception of Dean's and Lamb's roles in NSD. As Moore pointed out, Lamb was involved in more interactions with other elements of STP than virtually anyone else in NSD, and supervised more people. (Tr. 1553, Moore)

75c at 4) That month, as his first major act as head of NSD, Balcom eliminated the NSD Compliance section. (Tr. 1448, Balcom) He then stopped the standard annual performance appraisals for those in the NSD. (Tr. 1703, Jones) During this time, it became apparent that Hinson would take Access Authorization with him to Licensing or Human Resources.

80. In early March 1992 there were approximately 22 HL&P employees in NSD. Seven were supervisory. Two were clerks. There was a two to one supervisory/professional ratio. Balcom decided in March 1992 that the Wackenhut contract personnel should be eliminated, causing a reduction of 18 Wackenhut personnel in Operations. All remaining functions were to be organized in three sections, plus Wackenhut's Operations Division. Balcom then selected functions for each section and determined the number of people to carry out the functions in each section. Total reductions of 23 Wackenhut, and 7 HL&P employees resulted from this process. Three HL&P employees would be transferred to Licensing with Access Authorization. Among the several transfers of functions to other departments, the Safeguards Information program was transferred to management records. Balcom testified that he spoke to the transferee, who allegedly did not need any extra people. This seems odd, if substantial work was involved. The consequence was that Dean did not follow his area of expertise. This result kept him eligible for elimination and under Balcom's control. Two professionals and two supervisors remaining in NSD would be eliminated. (Tr. 1214-15, 1223-24, 1229, 1404-09, 1411-13, Balcom) Neal had resigned in March 1992 because his Compliance section was being eliminated, and he believed he was going to be fired by Balcom in retaliation for his going to the NRC (Tr. 2919-20, Neal).

81. To effect these results, Balcom made a list ranking the NSD employees from top to bottom, and solicited similar lists from Hinson and Moore, comparing them with his own. He said he then destroyed the lists. He testified that he never discussed the lists with anybody, and never told Moore or Hinson his particular ranking. (Tr. 1224-26, Balcom) By then he would have had virtual assurance of the outcomes of any formal forced ranking process. Balcom testified that he did not merely adopt Hinson's or Moore's recommendations. He "sanity" tested their evaluations against his own and submitted them to HR for review. (Tr. 1424, 1432, Balcom) Balcom approved the result of the forced ranking process, which placed Lamb at the bottom of the supervisors' rank order and led to his selection for termination. Balcom selected Dean for termination when he broke the tie between Dean and Brick in favor of retaining Brick, who had neither Dean's expertise or transferrable skills, and was a notably unexceptional employee. (Tr. 1432, 1435, Balcom; C-43)

82. Although he ranked people, and compared his rankings with those of Moore and Hinson, Balcom denied discussing those rankings.

He testified that in his meeting with Hall and Kinsey to discuss the reorganization, he never discussed any people, only the reorganization, "the number of people but not the people." (Tr. 1224-30, Balcom) Balcom met with Randlett a few times to discuss specific problems, mostly about the systems. However, he testified that he specifically rejected Randlett's offer to disclose his opinions of NSD personnel, in favor of forming his own independent opinions. (Tr. 1215-17, 1417-18, Balcom; HL&P-158 at 42-43, Randlett) I am persuaded that a plausible motive for this conduct is that Balcom consciously sought to insulate himself from information about Dean and Lamb because of what he could reasonably expect to learn.

83. In April, 1992, nearly four months after transferring to NSD, Balcom had devised a plan for reorganization of the NSD that he testified was the result of a process exclusively within his discretion and control. The plan provided for certain organization changes, and a reduction in force that would adversely affect two supervisors and one professional within the NSD. The Access Authorization section was to go out of NSD. Investigations would also be transferred. Safeguards Information would be transferred to Document Control. Compliance, which he viewed as redundant to QA, would be eliminated with NRC approval. Mid-level management, the division managers, were deemed unnecessary and interfered with communications between functional sections and the department manager. (1401-02, 1404-06, 1409-12, Balcom)

84. Balcom submitted his plan to Kinsey for approval, allegedly discussing the number of people and positions that would be affected by his proposed reorganization. Balcom and Kinsey then met with Hall on March 17, 1992 and obtained his approval. (Tr. 1228-29, Balcom) Balcom testified that he never discussed with Kinsey or Hall which individuals would be terminated in the reorganization. (Tr. 1229, Balcom) I find that difficult to believe, under the circumstances, unless the outcomes were implicit. Although the evidence suggests that the reorganization may have been justifiable as an experiment in convenience, or marginal utility, the evidence does not establish that it was either urgent or essential in form or substance. As incentives, these considerations are significantly less compelling than eliminating Dean and Lamb would have been.

#### Evaluation of Personnel - The Process

85. Hall directed Balcom to consult with HR and legal counsel in making the decisions as to who was to be transferred or terminated. (HL&P-75g) On March 19, 1992, Balcom requested an "objective" basis from Human Resources to help determine who would be terminated. (C-41) Balcom contacted Odom, Manager of HR. Betty Brown, Director of Personnel, contacted Balcom, and they decided to utilize STEP program which had been used during prior year's 10% RIF of 1300 employees. Utilization of STEP involved use of the

Special Performance Profile (SPP) for each employee. In fact, this was apparently the only element of STEP that was taken and adapted for the NSD reduction in force. STEP was an imported program with which STP personnel were not familiar. They had no training in its implementation. It had not been used at STP before, and has not been used since. It had been previously used for substantially larger groups of employees at HL&P than were involved in NSD. Claimants contend that the choice and implementation of the STEP procedure reflected a conscious bias against them. (Tr. 1009-10, Hall; 1251, 1339-40, 1474, Balcom; 1522-23, 1527, Moore; 3404-05, Brown; 1702, Jones; 1182-83, Randlett; C-96) I find that the process has all the earmarks of a cover for a previously conceived result.

86. Randlett testified in his deposition that he did not know what process was used to terminate Dean and Lamb, but that he did know what process is normally used, and described it. He testified that the normal determination of best qualified personnel for a position is by looking at their job performance evaluations or appraisals; that he had used performance evaluations, and not special performance profiles in his management efforts at STP. He testified that he had never fired anybody, was not aware of anyone being fired, but STP had moved people around and demoted people, and he had heard of people being asked to retire or to move to different locations. (Tr. 1180-83, Randlett)

87. In April 1992 Balcom received the SPP package from Human Resources. Balcom did SPP's on those directly under him, i.e., Moore, his secretary, and an administrator. This arrangement, in effect, insulated Moore from competition with Lamb. Balcom assigned former Division Managers, Moore and Hinson, to prepare SPP's on employees under them. This decision would also have insulated Moore and Hinson from competition with Lamb and increased Lamb's vulnerability. Balcom assertedly did not tell anyone in NSD why SPP's were being completed. The reason for their preparation, however, should have been obvious to all but the naive. At this point, Balcom knew Hinson's and Moore's ratings of NSD personnel, so it can be inferred that he could be quite secure in predicting their SPP ratings. (Tr. 1233, 1300, 1424, 1432, Balcom; 1532, Moore) Balcom reviewed the SPP's, met with Moore and Hinson, resolved inconsistencies, and sent the SPP's to HR for review. (Tr. 1231-32, 1255, Balcom)

88. The SPP process utilized a numerical scoring system to allow relative ratings in various categories. It was generally recognized that the SPP device was used to reach a forced current ranking of employees against each other for the purpose of reducing staff. Certain of the anomalies and deficiencies which were cited by the OIG and the DOL investigator, are supported by evidence adduced at the hearing. HR personnel questioned certain aspects of the process as well. The following examples are illustrative and significant.

89. When disparate ratings of two STP employees, Worth and Brick, were challenged by HR based on past annual performance ratings, Worth was given an additional point under present job functions and Brick one less. However, NSD management then reduced Worth's previous score under evaluation of other job related duties from 0 to -2, ensuring that Worth still had one fewer points than Brick. (C-2 at 32)

90. Although the SPP instructions stated specifically that skills "of special value" or "possessed by only one or some" be considered, there was no mention in Lamb's SPP of his skills as a firearms instructor, Certified Protection Professional, or first person in the NSD authorized to evaluate all Nuclear Security tasks. Unlike Lamb, Pomeroy received a point on his SPP for being an NRA firearms instructor and certified armorer. (C-2 at 33) This was a factor that seemed in practice to lend itself to a wide latitude for subjective manipulation.

91. Negative comments were made on Dean's SPP relating to his mishandling of Safeguards Information on several occasions, but no mention was made of such an incident on Sheesley's SPP, although he was also reprimanded. (C-2 at 33)

92. Of the seventeen employees rated pursuant to the SPP process, only Dean, Lamb, and Worth were awarded negative points. OIG reviewed the most recent official performance ratings, which are in evidence, and concluded that, had either performance or seniority or a combination of both been used to justify terminations, Lamb, Dean, and Worth in combination would not have been terminated as a consequence of the elimination of the three NSD positions. OIG concluded that Dean would have been terminated under various applications of performance ratings. (C-2 at 34)

93. Review of the SPP's for HR was assigned to Patricia Jones, an employee of the Human Resources Department (HR) since 1990. She was asked to evaluate the process or SPP forms that Balcom had used to determine fairness, consistency, and conformity to company policy. She was not familiar with those forms. She knew from the beginning of her involvement that two professionals and one supervisor or manager were to be eliminated from NSD. Her instructions were limited, but she was to evaluate Balcom's process in completing the SPP forms, and after review, to confer with him, so that "whatever we came up with was going to be the final decision." (Tr. 1702-03, 1747, 1750, Jones; HL&P-2)

94. Jones saw "some problems" in the system as it was applied. She had concerns about certain discrepancies and inconsistencies in Balcom's rankings, particularly the difference between what was reflected in the personnel files and what was on the SPP forms. An example of such discrepancies was the comparison of Brick and Worth. She discussed these concerns with Balcom in April 1992. She pointed out the unfairness with the way Lamb had

been rated, as compared to Sheesley, and that the lack of comments was a significant omission with respect to the way Lamb had been graded. However, the ratings of Lamb were not changed. (Tr. 1707-08, 1729-30, 1741-42, Jones)

95. Rankings from SPP's were as Balcom had ranked them in his own mind. The only negative points given to any of the seventeen NSD employees rated were given to Lamb, Dean and Worth, who were whistleblowers. Balcom characterized the result that these three were whistleblowers as coincidence. The conspicuous absence of substantive comments to justify the ratings given in most instances is a convincing indication of arbitrary process. (C-38, 42, 43; HL&P-4, 5; Tr. 1705-06, Jones; 1292-93, Balcom)

96. However, Jones testified that she had discussed with Balcom her concern with Worth's appraisal, which reflected "such a significant change -- or demise in his performance versus the appraisals," and that "[h]e explained to me that there were some serious problems there that had erupted within the last 12 months, and Mr. Worth was not supportive of management." That problem was reflected in Worth's revised SPP by a comment accompanying a -2 rating in the "Evaluation of other job-related factors" category staging, "Has not been supportive of management positions regarding Security Department decisions." (HL&P-4; C-42, 43; Tr. 1738-40, 1755-56, Jones) That characterization, not being supportive of management, is the essence of disapproval of protected activities which is at the crux of these adverse evaluations.

97. Jones also had been concerned about Brick's evaluation which had been rated higher than his annual performance appraisals would have warranted. After she consulted with Balcom, he returned with Brick and Dean in a tied position. The tie was broken in favor of Brick, purportedly because of Dean's discipline problems. (Tr. 1758, Jones) While this result was not unreasonable, the flexibility availed by subjective factors in the comparative evaluations is manifest. In this regard, Worth and Dean were tied at 7 for the lowest ratings among the professionals, of whom, the three closest competitors were rated 8, 8, and 9. The effect of Dean's -3 related to other job-related factors, specifically the disciplinary matters, and Worth's -2, apparently added after a reconsideration because of his alleged nonsupport of management positions regarding security department decisions, were obviously controlling. (C-43)

98. Several other aspects of the implementation of the STEP procedure by Balcom at the NSD impeached the fairness and impartiality of the procedure. Balcom must have known enough about Lamb's and Dean's past performance and activities as a result of his lengthy investigation to have anticipated the results of the STEP procedure. Thus I note, but do not rely directly upon the DOL investigator's review of the forced ranking process utilizing the SPP's in detail and concluded that there were inconsistencies in

the rankings, which were very subjective in nature and reflected the obvious failure by the supervisors to follow the SPP instructions. (C-12B at 19-20; C-13 at 31-33) Noting that two Speakout reports prepared by STP had concluded that there was no evidence of discriminatory action against Dean or Lamb, the OIG Investigative Report stated, "However OIG's analysis of the criteria used to justify the terminations determined that there were a number of anomalies in its application and that the SPP instructions were not followed." (C-2 at 32)

99. The DOL investigator's reports were expurgated to avoid identification of individuals. However, he observes six instances in which very low ratings of "1" or "2" were assigned to individuals with respect to their potential to perform another job function, but no comment was provided as required, or, in two instances, the comments were too vague to justify the low ratings. (C-13) One comment was "good potential to perform in other areas of responsibility with proper coaching" and the other was, "minimal experience outside of current duties, however, has shown willingness to accept new tasks." The investigator also noted that one SPP which disclosed no disciplinary problems, reflected a deduction of two points because the rater felt the subject "has not been supportive of management positions regarding security department decisions." He also cited an instance in which Hinson, who had not initially made comments in one instance, made a change after meeting with Balcom. (C-13) He noted that the rankings were subjective, but that, in addition, the failure of the raters, who were supervisors, to follow applicable instructions showed "a distinct pattern of rating Mr. Lamb...the lowest." These observations are supported by a review of documents in evidence. (C-12B, 13)

100. I find on the basis of the evidentiary record that, while the use of the SPP process was ostensibly objective, it could be, and in fact was manipulated to Dean's and Lamb's disadvantage, because it allowed for the virtually unfettered application of subjective judgment. In this instance, its application was by personnel who were not experienced in using the process. Although the SPP instructions required comments to accompany the numerical scoring system, there is little that is explicit regarding the manner and underlying reasons for the scores which were awarded. There were significant adjustments in ratings in the initial process, and upon reconsideration. Jones did her own set of evaluations, based upon annual performance evaluations and personnel files, and came up with significantly higher ratings on the SPP's for Lamb, Dean, and Worth. Balcom administered the process with the aid of Moore and Hinson in a way which would have allowed him to predict and manipulate the outcomes, particularly with respect to Dean, Lamb, and Worth. The reconciliation of disparate methodologies of Moore and Hinson, the evaluators, allowed one form of manipulation of the process. I find that Dean's and Lamb's concerns which evolved into protected activities

contributed to Balcom's assessment that they should be eliminated as a product of the reorganization. (Tr. 1735-36, 1738-39, 1741-44, 1752-53, Jones; Tr. 1665-74, Moore; C-10, 42, 43; HL&P-2, 4, 5)

#### Moore's Knowledge and Participation

101. Moore's knowledge of Dean's and Lamb's activities and the evaluation process is relevant because Balcom may be deemed to have effectively delegated to Moore much of the decision-making authority to select those who would be terminated, or adopted, at least in substantial part, Moore's recommendations, which were tantamount to deciding who should be terminated. Moore provided input to Balcom, but he and Balcom both deny that Balcom discussed his plans for the department with Moore. (Tr. 1222-23, 1226-27, Balcom; 1532, Moore; C-75C at 4-5) Nevertheless, Balcom asked Moore to prepare SPP's, even though he testified that he did not tell Moore how they would be used. (Id.; C-75D at 5) It defies credulity, however, that Moore would not have inferred that the document would be the basis for transfers, demotions, or terminations.

102. Moore knew of Lamb's opposition to Randlett on the Management key and the power outage issues. (Tr. 1503-04) He denied clear recollection of opposition from Dean on the issue. (Tr. 1503, 1559, Moore; 712, Dean) On October 20, 1991, during the investigation of the Dean-Sheesley incident, Moore learned that Lamb and Dean had been to Speakout two and a half years earlier. However, he testified that Dean did not identify the issues raised. (Tr. 1567-69, 1605, 1630, Moore; 168-69, Dean) Moore denies telling Balcom of Dean's remark. (Tr. 1635-36, Moore)<sup>9</sup> Moore denies knowledge that Lamb and others contacted the NRC with concerns, notwithstanding the notes of Perez, the DOL investigator, which indicated that he did. (Tr. 1561, 1565-66, 1603-04; C-13 at 68) Moore's sworn statement to the OIG states that Moore "was not aware [that] Messrs. Dean, Lamb, and Worth had made allegations to the NRC." (Tr. 1599, 1601, Moore; C-75D) Moore was aware that

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<sup>9</sup>Asked whether he "knew for a fact that Mr. Lamb had been to Speakout" at the time the SPP's were filled out, Balcom responded, "I did not know it for a fact. There was a Speakout concern that had been forwarded to us as that investigation, that Mr. Lamb and I had talked about...I think the answer is that I believed that Mr. Lamb had been to Speakout. I think that in the course of this process, I found out that probably was not true." Balcom indicated in subsequent testimony that this belief was related to a theft investigation involving another department. (Tr. 1294-96, Balcom) The primary significance of the exchange is the disclosure of Balcom's awareness that Lamb had contacted Speakout for any reason, in conjunction with Balcom's narrow interpretation of what constituted his "knowledge" of such an interaction.



Drymiller, Sheesley, Neal, Lamb, and others were interviewed on site by the OIG when he was in 1991, but denies speculating as to whether someone had reported something to the NRC to initiate this inspection. (Tr. 1599-1600, Moore) What is clear is that Moore, in his behavior and his testimony, was a team player, not about to buck higher management authority for any reason, and I have weighed his credibility accordingly. (Tr. 1693-97, Moore)

103. Lamb believed Moore had a grudge against him based at least in part on an adverse memorandum which Lamb had written in 1987 or 1988 criticizing Moore. (Tr. 330-32, Lamb) Moore had later seen the memorandum according to Worth, but Moore testified that he did not remember it. (Tr.A. 17-18, Worth; 3402, Brown; 1533, Moore; HL&P-158 at 28-29, 74-75, Randlett) HL&P concedes that Moore had participated in discussions over time at HL&P and "obviously knew about the views of Lamb, Dean and most other security employees on various security issues." (Respondent's brief at 53) Complainants argue that Moore was prejudiced against Lamb because he was in direct competition against Lamb for one of the three supervisor positions. (Tr. 1710, Lamb) Respondent apparently concedes the competition, but argues that Moore did not know there was such a competition, because Balcom had not told Moore his reorganization plans. (Tr. 1532, Moore; 1300, Balcom) Respondents note that Drymiller and Sheesley were also in competition for the three positions, and that Moore's involvement would not have affected the relative ratings among Drymiller, Sheesley, and Lamb. Balcom purportedly rated Moore against those three, not just Lamb. (Respondent's brief at 54) The integrity of the process, however, is manifestly suspect under the circumstances.

104. Moore apparently commented on Lamb's SPP that Lamb's performance had declined during the past year, but he admitted not counseling him. Jones of HR noted that omission, as well as the failure to make an appropriate entry in the Supervisory Log pursuant to the constructive discipline program. Thus, the negative observation is purely subjective and undocumented, but not inconsequential. Balcom had noted that Worth's recent performance was a factor in his relatively low SPP score. (C-2 at 33)

105. Another manifestation of subjective evaluation appears from a comparison of the SPP's and the recent annual performance evaluations of Lamb and Sheesley, with whom Lamb was apparently in the most direct competition for survival. Balcom, despite his recent assumption of responsibility for NSD, had inexplicably canceled annual performance evaluations of NSD personnel in 1992, shortly after he was installed. (Tr. 1703, Jones) Presumably, a recent favorable performance evaluation would have made Lamb's, or anyone else's, elimination more difficult. Moore awarded four of five points overall on both Lamb's and Sheesley's last annual performance ratings. But he awarded Lamb only five of ten points with no negative comments on his SPP under "Evaluation of Performance in Present Job Function," while awarding Sheesley six

of ten points with the negative comment, "Performance recently affected due to not being selected for assignment to Access Authorization group." Moore got a 7, without comment, from Balcom. It can reasonably be inferred that Lamb's whistleblowing was a substantial, if unmentionable, factor in this relatively low rating. SPP instructions require comments if performance has changed since last appraisal. They require that supporting documentation in the department file cite specific examples of performance changes. This was not done. Jones of HR who reviewed the SPP's also observed that there were inconsistencies between performance appraisals and the SPP and inadequate comments to support the ratings. The latitude for subjective evaluation by a nondisinterested evaluator such as Moore is apparent. (C-2 at 33)

106. Moore awarded a "-2" to Lamb on his SPP with the comment, "Not supportive of management decisions with which he does not agree." Lamb's protected activities would be inseparable from such an assessment. Moreover, the assessment contrasts with Moore's assessment on Lamb's most recent Performance Appraisal dated February 8, 1991, which stated under "Leadership/Team Building" that "Mr. Lamb instills a cohesive spirit within his staff. Individual abilities are utilized to achieve positive results." Moore awarded Lamb the highest rating under this rating factor, and under the rating factor relating to improvement, recorded "no deficiencies noted." I infer that the SPP rating is the product of substantial subjective input by a nondisinterested evaluator. (C-2 at 33-34)

107. Moore's negative comment on Lamb's SPP that Lamb was unwilling to accept a transfer admittedly reflected only Moore's subjective perception. (Tr. 1553, Moore) Lamb indicated that he had not been asked if he would accept a transfer, and that, on the contrary, he would have accepted a transfer. (C-2 at 34) The evidence generally suggests that this was an ill-founded and erroneous assessment.

108. Under the circumstances, Lamb's other competition would have included Moore, who was clearly a company man, and who was chosen by Balcom to evaluate Lamb. (Tr. 1694-97, Moore) Drymiller had a college degree and certain other distinguishing characteristics, including consistently favorable performance evaluations which left him in a relatively secure position. Balcom's ranking of Moore, however, was essentially noncompetitive, since Moore ranked the other supervisors, Drymiller, Sheesley, and Lamb, against each other, but not himself. Moore's rating of 7 related to performance in present job function, his rating of 3, without comment, related to potential to perform another job function, and rating of +3 related to other job-related factors, because he handles special projects well with little impact on other duties, with two assignments cited, gave him the same numerical ranking as Drymiller. Lamb's unexplained 5, 2, related to other job functions, because of the alleged unwillingness to

transfer, and -2, because of his alleged nonsupport of management, respectively, left him with a very low ranking within this process. (C-42)

109. When Jones of HR was questioned regarding her review of the SPP's which Balcom had submitted, she appeared sufficiently protective of HL&P's position to give her testimony a suggestion of bias. However, in her testimony she agreed that the first category on the SPP form should generally reflect the rated individual's performance appraisals "allow[ing] for any changes within the last twelve months if they were critical because none of these people had had performance appraisals from 1992." She also agreed that if there had been changes, they were required to be noted in the comment section.<sup>10</sup> (Tr. 1714-15, 1717-18, Jones) In a detailed comparison of the last available annual performance appraisals of Sheesley and Lamb, both made by Moore on February 6 and 8, 1991, respectively, the documents and Jones' testimony established that Lamb's ratings exceeded those of Sheesley in virtually every category of evaluation, were tied with Sheesley in a few, and were exceeded by Sheesley's in only one. Significantly, Sheesley had received a "6" in the first category of his SPP, with a notation that his performance had recently been affected because he did not get a desired assignment. This was an implicitly negative comment reflecting a recent change. Yet Lamb received a "5" with no comment. (Tr. 1719-30, Jones; C-3, 42, 69C) In the absence of explicit justification for the unexplained disparity in these ratings, I infer that the disparity was motivated by negative bias against Lamb. Jones opined that if Moore knew he was in competition with Lamb for one of the three supervisory positions

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<sup>10</sup>Balcom testified that, although explanations should have been included for any serious deviations between the annual performance appraisals and the rankings on the SPP's, it was to be expected that there would be some differences in the SPP ratings and the annual performance ratings, which he noted were four months to a year old. He was asked, "It's not a significant deviation in your mind to take a highly competent performer such as Mr. Lamb, as reflected by all of his performance appraisals, and rank him at barely above average, or in the average category: That isn't a deviation in your mind, Mr. Balcom?" He answered, "It's not a significant deviation, no, sir." (Tr. 1343-44, Balcom) This exchange, which related in part to the absence of written justifications for the assessments, reveals the latitude available to, and in fact utilized by, the evaluators for subjective and unexplained assessments. Obviously, under the circumstances, the differential was significant, and had significant adverse consequences for Lamb. Because the deviation so clearly required an explanation, Balcom's denial tends to prove a discriminatory motive.

remaining under the Balcom reorganization, it would not have been fair. (Tr. 1710-11, Jones)

110. In the absence of budgetary or other considerations, which have not been proved to have been a significant incentive for the reorganization of NSD or its form, there is no obvious cause for eliminating an employee of Lamb's manifestly high caliber except retribution for his protected activities. It can be noted from the listing by Jones of HR that Lamb's overall performance appraisal ratings of 4 and 4 in 1990 and 1991 was exceeded by 5 and 5 for only two other employees of the eighteen in NSD, and one employee with a 4 and 5. Lamb's 4 and 4 ratings were consistent with those of a clear majority of the personnel in NSD, including Moore and Sheesley. Dean's 3 and 3 were the lowest in the division. (C-10; Tr. 1736, Jones)

111. I find that the use of the SPP device, borrowed from the STEP procedure employed for a large reduction in force at HL&P, but never previously or since at STP, offered a way to circumvent Lamb's long term favorable performance evaluations and to manipulate the process by means of a device speciously justified as an impartial means to rate employees against each other. The SPP had only five categories to be rated; the last, "Evaluation of other job-related factors," allowed an especially large measure of subjectivity. The element of subjectivity was clearly critical in selection among closely competitive employees by a less than impartial evaluator. Further evidence of this element of subjectivity was Balcom's attitude that, in adapting the SPP process, which was designed to be used for large organizations, to NSD, a small organization where Balcom knew he was the final authority making the decisions; who felt he knew the people involved pretty well; and who was mainly interested "in just getting people ranked," "didn't think that the comments were essentially needed." (Tr. 11474-75, Balcom) This approach would lend itself to desired and predictable outcomes.

#### The Annual Performance Appraisals

112. The annual performance appraisals, by contrast, involved multiple factors of varied types together with comments, including a section for recently assigned objectives, and employee input. In August-September 1986, after eight months in position, Lamb received an "Outstanding" overall performance rating with the comment, "Mr. Lamb is a very outstanding and dependable employee and is definitely a key asset to the Nuclear Security Department," by his supervisor, Lancaster, and second level supervisor, Moore. His greatest strengths were described as "his communicative skills (both oral and written) his ability to plan and organize his work and the work of others and his ability to provide a professional product under adverse working conditions." It was noted, "Mr. Lamb has no areas where improvements are needed." (C-8) His annual appraisal in December 1986, after a year in position, was to the

same effect, except that his overall performance rating was reduced a category to "Highly competent performer; often exceeds standards for the job." The comments were the same. This evaluation was not countersigned by Moore. (C-7)

113. In the evaluation of February 1, 1988, Lamb continued as "highly competent performer; often exceeds standards for the job," and his "greatest strengths" were identified, "Dave's security knowledge and his leadership skills are his greatest strengths." The evaluating supervisor, Kern, noted, "There are really no areas that are identified as 'needs improvement,' but some improvement could be made in evaluating his subordinates' performance." (C-6)

114. In the evaluation of February 14, 1989, Moore rated Lamb overall in the next lower category, "Good competent performer; meets and maintains standards for the job," and commented, "Mr. Lamb is an asset to the Security organization. His knowledge and experience result in improved performance in all areas of Security." Lamb's greatest strengths were identified as his "knowledge and his ability in decision making." Improvement needed was identified, "Mr. Lamb should work on developing his subordinates through additional training and coaching." The evaluation was countersigned by Randlett as second level supervisor. (C-5)

115. In the evaluation of January 26, 1990, Kern rated Lamb in the next higher category again, as a highly competent performer, commenting, "Dave had really improved over the last year in attitude and support of management directives." His greatest strengths were, "Security Systems and Program knowledge and willingness to share and use this knowledge." As for improvement, Kern noted, "Dave needs to be a little less sensitive about feedback regarding his supervisory style." This praise regarding management directives followed a period of frustrated withdrawal by Lamb from his previous active pursuit of his concerns with deficiencies in STP's security. (C-4)

116. In the evaluation of February 16, 1991, Moore rated Lamb as a highly competent performer again, commenting, "Mr. Lamb has successfully carried out his responsibilities during this past year. These successes have contributed significantly to the favorable RER and SALP 1 rating for Security." The absence of deficiencies was explicitly noted. Lamb's greatest strengths were identified as, "Mr. Lamb possesses a great deal of knowledge and experience. This aids our Department effort to improve efficiency and performance." The evaluation was countersigned by Randlett. (C-3) The evaluation was prepared before the March 1991 power outage which precipitated Lamb's and Dean's next important whistleblowing activities.

117. In light of these annual performance appraisals, and the fact that Balcom had canceled the appraisals for 1991 that would

have been prepared in early 1992, I find that Lamb's low rating on the SPP is suspect, especially in the absence of a compelling reason for a reorganization requiring a reduction in force unique to NSD. Moreover, in the face of a prior history at STP of reorganizations of NSD, and apparently other divisions, which did not require terminations; and in light of the abrupt terminations of Lamb and Dean with no warning and no significant effort, especially in Lamb's case, to retain a competent long term employee, when prior reorganizations at STP would allow individuals at least thirty days to find positions within the company or on site. Therefore, I find Lamb's SPP rating to be impeached, where the inference of an underlying improper motive is so well supported by evidence.

118. Jones agreed that these annual performance appraisals, would determine the rating of the first of the five categories of the SPP's, in the absence of significant changes within the last year. That category related to "Evaluation of performance in present job function. Consider knowledge, skills, and experience; quantity and quality of work; effectiveness in performing the job." Lamb's 5 out of a possible 10, in the average range, given without required comment is inconsistent with his performance appraisals, which are clearly at least above average. The absence of credit for specialized training and skills is not satisfactorily explained, given the technical subject matter and Lamb's history of professional training and experience. Lamb's "average" rating relating to potential to perform another job function within functional area, with the comment, "Knowledge and experience would allow for transfer however unwillingness would negatively affect results," is inexplicable in light of Lamb's denial of unwillingness. In the absence of proof of a source for that comment, other than Moore's subjective surmise from a nondisinterested perspective, the impartiality of the evaluation is impaired. In the absence of significant change within the last year, the arbitrary deduction of two points related to "other job-related factors," accompanied with the comment, "Not supportive of management decisions with which he does not agree," impeaches the integrity of the SPP evaluation by Moore.<sup>11</sup> The disparities are

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<sup>11</sup>Balcom's testimony regarding Hinson's SPP evaluation of Worth is instructive. "In working with Mr. Hinson and Mr. Worth, the decision was made to bring Mr. Brick's performance down, because it was not sustained performance, as Pat Jones had identified in the review process. Mr. Hinson identified that the reason he had rated Mr. Worth low was because he had, over the last year, recently developed an unwillingness to do routine directions the way management wanted it done, but proposed to do things his way. We said, that's very similar to the way Mr. Moore observed Mr. Lamb, so in order to be consistent between the way we rated Mr. Lamb, we did the same thing with his performance, or with Mr. Worth's performance as we had done with Mr. Lamb." (Tr. 1428, Balcom)

such as to indicate an extrinsic influence or ulterior motive for the low evaluation, probably related to Lamb's protected activities.

119. Because Dean was not so effective an employee as Lamb, the conclusion is more difficult, but I find that his SPP is tainted also by the defective process employed in preparing the SPP's. That process was tainted by such factors as the addition between the April 2 and April 21, 1992, versions of Worth's SPP, of a -2 rating under "Evaluation of other job related factors: with the comment, "Has not been supportive of management decisions regarding Security Department decisions." The apparently repeated changes in the SPP's of Brick and Gregg, who appear to have been Dean's closest competitors, but who lacked Dean's transferable knowledge, also suggest the possibility of outcome determinative manipulation, or lack of impartiality. (Tr. 1753, Jones; 1688-90, Moore; C-43)

#### The Roles of Hall and Kinsey

120. HL&P and Hall deny that Hall had role in Balcom's selection of Lamb and Dean for termination. Hall delegated responsibility for the reorganization and related terminations to Balcom. Balcom denied that Hall expressed any expectation that personnel in NSD would be reduced, or suggested that Lamb or Dean be terminated. (Tr. 1444, Balcom) Hall disclaimed any direct input to Balcom as to how to reorganize NSD, except his expectation that NSD focus on the physical protection as the plant. (Tr. 1047, Hall) Hall approved the reorganization as properly focused. (Tr. 1050, Hall) Hall's only input as to selection of individuals to be affected by reduction in force was to instruct Balcom to consult with Human Resources to insure correctness. Hall disclaimed discussing with Balcom the individuals to be impacted. (Tr. 1052-53, Hall) He also disclaimed discussing with Balcom who had been raising issues as to the management key, power outage, or other such issues when Balcom was reorganizing the NSD. There is no direct evidence to the contrary.

121. HL&P and Kinsey deny influence by Kinsey on details of reorganization. In a carefully prepared statement Kinsey stated that he was involved in the decision making process related to the NSD reorganization. He stated that reorganization of the NSD had been under consideration since August 1990 when he and Hall directed Randlett to explore a reorganization of NSD. Nevertheless, apparently no significant action was taken until a year and a half later. Kinsey provided Balcom with the guidance that NSD should concentrate on physical security, and that access authorization and control of Safeguards Information should be transferred out of NSD. Balcom suggested additional changes, such as reassignment of the training coordination function, all to produce a more efficient NSD. Balcom discussed with Kinsey "the

number of people and the positions that would be affected by the reorganization." (C-75B)

122. Kinsey testified that he discussed with Balcom the need to focus the NSD and approve the reorganization. Kinsey testified that he did not give Balcom "any direction on whom to cut, or how to cut, or how many to keep. (Tr. 1176, Kinsey) There is no direct evidence to the contrary.

123. Kinsey categorically denied knowing which individuals raised NSD concerns in the summer and fall of 1991, until preparing for trial. He especially disclaimed knowledge of who was raising issues as to the power outages, the management key issue, the inappropriate lockdown of Unit 2, and lighting, or who was going to the NRC or to Speakout with concerns. However, he admitted speculating who was raising the issues in NSD, and being aware that someone was going to Speakout, and that, contemporaneously, Randlett was telling him that Lamb was accusing Randlett of related violations. When it is considered that Kinsey was familiar with NSD, its personnel, and its problems, and that the issues involved Lamb's responsibilities, and that Lamb was at loggerheads with Randlett, it may be reasonably inferred that any speculation of the type that Kinsey described was focused, and not idle, and the probabilities are very high that the focus was on Lamb. The nature of Lamb's concerns was such, and their durability, and involvement in the several investigations was such, that one in Kinsey's situation would readily suspect the identity of the concerne, even if protocol would have precluded him from vindicating his suspicion absolutely.

124. Kinsey opined that Balcom did not know who was making allegations or going to Speakout on the security issues. Kinsey swore "that the reorganization that resulted in the termination of [the] whistleblowers, Mr. Lamb, and Mr. Dean, and Mr. Worth, was just a coincidence." (Tr. 1090-91, 1121-22, 1172-77, Kinsey)<sup>12</sup> Common experience makes such disclaimers suspect, and I do not believe them, especially in light of HL&P's artificial insulation of the managers and decision makers from each other and useful information. Such contrived isolation allegedly characterized their dealings with the whistleblower concerns raised within the company and in the course of the subsequent investigations and the

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<sup>12</sup>Defining "knowledge" literally and narrowly, by implication, Kinsey responded to the question, "Do you know, as you sit there today, whether or not Mr. Worth for example did or did not go to speak out to the NRC (sic)?", "I don't have any recall or specific knowledge. Mr. Worth never came to me and told me. Nobody ever told me that Mr. Worth did, and I don't remember reading any testimony that said that Mr. Worth went." (Tr. 1177, Kinsey)



personnel involved, although the players were clearly familiar with each other and operated within a relatively limited environment.

125. There had been numerous reorganizations of NSD in the past. They tended to occur as each new manager assumed responsibility with his own concept of structure for the department. (Tr. 2040, Pomeroy; 1525, Moore) Pomeroy opined that there had never been any real differences in what NSD was doing after past reorganizations, and little following Balcom's. After Balcom's reorganization, there was, in effect, the same number of managers as there had been before. (Tr. 2041, 2129, Pomeroy) Past reorganizations had also given individuals affected thirty days notice to find positions, after which they would be terminated. (Tr. 1334-35, 1475-77, Balcom) Several prior reorganizations of NSD had resulted in transfers, not terminations, of excess employees. (Tr. 1525-27, Moore)

126. The process of evaluation and reorganization was concluded sometime after April 20, 1992. (Tr. 1293, Balcom) Lamb, Dean, and Worth were terminated May 4, 1992. Balcom terminated Dean and Lamb so abruptly, even brutally, that the circumstances raise an inference of retribution. Balcom's reorganization, apparently, was not completed in late April when Lamb asked about his future before taking a vacation, and Balcom was noncommittal. Lamb returned from vacation and was terminated immediately by Balcom. Balcom also said he would not allow bumping. He gave no reason. Dean was terminated a half hour later. Balcom testified that he did not remember that thirty day notice to employees to allow a job search was part of the STEP program, because he was not intimately involved in it. He also admitted that he "had jerked [Lamb's] access before [he] ever told him he was fired," allegedly "in accordance with standard procedures for people who are going to be terminated." (Tr. 1476-77, Balcom) This attitude and action suggests that retribution was a basic motive in the process.

127. Balcom would not allow Lamb, a first line supervisor, to "bump" lower level employees. However, he allowed second line supervisor Moore, in effect, to "bump" Lamb when his position was abolished under the reorganization. (C-2 at 34)

128. Balcom testified that he had double-checked that there was no other position available for Lamb, Dean, or Worth. Balcom and STP provided only perfunctory assistance to either Lamb or Dean in finding other positions to which they might transfer within the company. Moreover, instead of following STEP procedures utilized at HL&P, which gave impacted employees 30 days notice and the opportunity to re-post and seek a position elsewhere in the company, Balcom jerked their access before they were told they had been terminated. (Tr. 1053, Hall; 1753, Jones; 11476-77, Balcom) Complainants contend that Lamb, Dean, and Worth were the first employees of NSD that had ever been laid off or terminated by STP in connection with a reorganization or downsizing without the

opportunity to accept another position. This allegation was not refuted. (C-3 at 5; Tr.A 1225-26; 199, Smith; Tr. 1525-26, Moore) Normal practice at STP was to transfer personnel within the NSD or outside the department, even if persons involved required retraining to perform in their new positions. (Tr. 1527, Moore; Tr.A 182, Smith) (Tr.A 115, 125-26, Drymiller; Tr. 190, Smith; 24, Worth; Tr. 1942, Lala; 2064, Pomeroy; 2919-20, Neal; 1871, Williams; 1753, Jones)

129. Because control of Safeguards Information was Dean's primary responsibility and within Dean's specialized expertise, such a transfer of responsibility could have been expected to move Dean with it, thus effecting a reduction in force in NSD without the necessity of a termination. The fact that Dean was not so treated, suggests a discriminatory motive on Balcom's part. Dean's successor in this specialized field is not indicated, and it does not appear that when Balcom broke the tie between Dean and Brick, that Brick would have assumed Dean's responsibilities in this regard, or that the loss of Dean's expertise was a consideration. This circumstance generates an inference that Dean's termination because of his inconvenient concerns was a significantly higher priority than the retention of his expertise.

#### The Underpinnings and Effects of the Reorganization of NSD

130. Balcom's reorganization involved a small reduction in force, exclusively in NSD. There is no evidence which proves that the reduction in force was indispensable or even compelled by any serious or urgent need. Urgency is belied by the time it took Balcom to accomplish the reorganization and terminations. Significant budgetary considerations are belied by the announcements and budgetary approval which preceded Balcom's transfer to NSD. None of the problems which NSD apparently had under Randlett were attributed to excessive supervisory or other personnel. Hall's directive to focus on physical security could be construed as a minimal rationale for reorganizing. Reorganizing, however, would allow Balcom to jettison uncooperative employees under a new regime. That, quite clearly, is what he did, with the advice of counsel and a fair degree of finesse.

131. As previously suggested, I find that an intensive and sustained inquiry and investigation of a small department conducted by so knowledgeable and experienced supervisor as Balcom would inevitably after four months have generated a clear image of Dean and Lamb and the particular concerns about significant operations of the department which they had raised with Randlett, as well as how they had been resolved. Dean and Lamb were conspicuous and significant as the result of both the internal concerns they had expressed, and the NRC's investigations that their concerns had generated. Balcom could hardly have avoided learning about the long term relationship that had existed between Lamb and Dean. With the elimination of Lamb, and his associate, Dean, Balcom would

have eliminated two employees perceived as disruptive because of their dissents from particular, well identified, and controversial management decisions. From his point of view, they would have been the antithesis of team players. These considerations are inseparable from Dean's and Lamb's complaints to the NRC, which clearly shaped Dean's and Lamb's status within STP and NSD, and with Randlett and his successor, Balcom. Such perception would create the obvious motive for Balcom to terminate both Lamb and Dean, whether or not he could or would swear he knew that Dean or Lamb had gone to the NRC.

132. By January 1992, Dean's and Lamb's activities had caused significant problems for HL&P. There had been investigations by the NRC and internal audits, and lowered safety ratings, which required responses. These cost the Employer money and prestige. The issues were readily traceable to Lamb and Dean, unless management was determined to remain ignorant of the connection. I conclude that HL&P management could not reasonably have been ignorant of that connection.

133. The divisions within STP were relatively small. Only seventeen personnel were evaluated in NSD in 1992 in connection with the SPP process. There was evidence of considerable interaction between divisions. For example, QA, which was part of Licensing, and was headed by Balcom before he transferred to NSD, conducted annual compliance audits of NSD. In such a universe, I find it probable that Dean's and Lamb's conspicuous activities, or activities which had consequences affecting other personnel at STP, would have been suspected or known to their peers, and in due course to their supervisors, and almost inevitably to upper management, which was required to respond to the investigations and their findings by remedial action.

134. It may also be assumed that these supervisory personnel and managers needed to know what was going on at STP. They needed to know, and would have wanted to know, the cause of the series of investigations by the NRC. Jordan's investigation at the behest of Hall in anticipation of the OIG's inspection was a reflection of this process. STP managers were too well advised by legal counsel and too sophisticated to have made direct inquiries or accusations against whistleblowers which would have had substantial visibility and carried high risks of predictably adverse legal consequences. I find that the circumstances provided the bases for educated guesses and well grounded suspicions that would have been more than enough for STP's management to have acted upon as they did, and I find that they did so, in substantial part because of the association of Lamb and Dean with the particular issues which have been described.<sup>13</sup>

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<sup>13</sup>An incident reflective of this process was described by Neal, who resigned before he could be terminated. He was asked if he had

Discussion and Conclusions of Law  
With Illustrative Supplemental Findings of Fact

Discrimination Claim

The ERA prohibits the discharge of or other discrimination against an employee in retaliation for, inter alia, the employee's assistance or participation in proceedings or in any other action that carries out the purposes of the ERA or the Atomic Energy Act of 1954. 42 U.S.C. §§5801-5891.

Under the ERA,

No employer . . . may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . (1) commenced, caused to be commenced, or is about to commence or cause to be commenced at proceeding under this chapter . . . ; (2) testified or is about to testify in any such proceeding or; (3) assisted or participated or is about to assist or participate in any other manner in such a proceeding . . . .

42 U.S.C. §5851 (1988).

To prove their discrimination claims under the ERA, Dean and Lamb, as Complainants, must demonstrate that:

1. HL&P is an employer subject to the ERA;
2. As employees, Dean & Lamb engaged in protected conduct;
3. HL&P took some adverse action against them; and
4. The protected conduct was the likely reason for the adverse action. DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983). See generally S. Kohn, The Whistleblower

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been present when Lamb had a premonition that he would be fired. Neal responded that in February or March 1992,

Mr. Lamb had just come back to the Security Department section in the administration building and I was walking down the little hallway. He grabbed me by the arm. We went into Mr. Drymiller's office, and he told us that he'd just ridden upon on the elevator with Mr. Kinsey and Mr. Kinsey wouldn't even speak to him and Mr. Balcom had gotten to the point where he wouldn't speak to him also, and he felt that he was going to be fired or terminated very shortly. (Tr. 2921-22, Neal)

Litigation Handbook: Environmental, Health and Safety Claims  
(1990), §3.14.

Prima Facie Case

To establish a prima facie case of discrimination under the ERA, a complainant employee qualified as such under the ERA must show (1) that he engaged in protected activity; (2) that the respondent employer who is subject to the ERA was aware of such activity; (3) that the respondent employer took some adverse action against the employee; and (4) that there is evidence sufficient to raise an inference that the adverse action was motivated at least in part by the protected activity.<sup>14</sup> Dartey v. Zack Co. of Chicago, 82-ERA-2 (Sec. Dec. Apr. 25, 1983, slip op. at 7-8); accord, Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1162 (9th Cir. 1984); Kenneway v. Matlock, 88-STA-30 (1989).<sup>15</sup>

1) Protected Activities

Although HL&P concedes that both Dean and Lamb engaged in protected activity, a threshold issue is which, if any, of their whistleblowing activities qualify as protected activity as a matter of law in the Fifth Circuit. HL&P asserts that Brown & Root, Inc. v. Donovan, 747 F.2d 1029 (5th Cir. 1984) precludes a finding that Dean's and Lamb's internal communications to persons and entities within STP or HL&P, as opposed to external communications to the NRC, were protected activities under 42 U.S.C. §5851. HL&P contends that the only activity of Dean and Lamb which is protected is their reporting of alleged violations to the Nuclear Regulatory Commission (NRC). The issue is significant, because HL&P disclaims all knowledge of the Complainants' external communications to the NRC. I find that the Complainants engaged in protected activities under the ERA.

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<sup>14</sup>HL&P's qualifications as an employer subject to ERA and its employee protections, and Complainants' status as employees entitled to those protections under the ERA are conceded and not in issue. (C-86b, 86d)

<sup>15</sup>Complainants are not required to establish that Respondent was motivated in its actions by Claimants' protected activities at this stage of their proof. To establish the requisite prima facie case, they need to produce only enough evidence to raise the inference that the motivation for the adverse action was their protected activity. This they have clearly done. See Pillow v. Bechtel Constr., Inc., 87-ERA-35 (Sec. Dec. Jul. 19, 1993), slip op. at 13, n. 9.

The Secretary of Labor has adopted an expansive definition of protected activity, and has consistently and respectfully declined to follow the Brown & Root decision. See Mackowiak v. University Nuclear Systems, 82-ERA-8 (Apr. 29, 1983); Wells v. Kansas Gas & Electric Co., 83-ERA-12 (June 14, 1984); Richter v. Baldwin Assocs., 84-ERA-9 (Mar. 12, 1986); Willy v. The Coastal Corp., 85-CAA-1 (Sec. Dec. of remand, June 4, 1987); Poulos v. Ambassador Fuel Oil Co., 86-CAA-1 (Apr. 27, 1987); Smith v. Norco Technical Services, 85-ERA-17 (Oct. 2, 1987); Nunn v. Duke Power Co., 84-ERA-27 (Dep. Sec. Dec., Jul. 30, 1987); Wilson v. Bechtel Constr., 86-ERA-34 (Jan. 9, 1988), Lopez v. West Texas Util., 86-ERA-25 (Sec. Dec. at 5-6, Jul. 26, 1988); Lockert v. Pullman Power Prods. Corp., 84-ERA-15 (Sec. Dec. at 1-2, Aug. 19, 1985); Bartlik v. TVA, 88-ERA-15 (Sec. Dec. of remand, Dec. 6, 1991), slip op. at 6. The Secretary continues to reiterate his assertion that internal complaints to the employee's supervisors and management are protected as within the scope of protected activities as well as external complaints to the NRC. See Pillow v. Bechtel Constr., Inc., *supra*, slip op. at 10-11; Carroll v. Bechtel Power Corp., 91-ERA-46 (Sec. Dec. Feb. 15, 1995) slip op. at 14.<sup>16</sup>

The Fifth Circuit, in which this case arises, has noted the Department's position. See In re Willy, 831 F.2d 545, 548 (5th Cir. 1987), and the fact that other circuit courts have disagreed with Brown & Root. See Consolidated Edison Co. of New York v. Donovan, 673 F.2d 61 (2d Cir. 1982); Mackowiak v. University Nuclear Systems, *supra*; Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1513 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986) (protection afforded during all stages of participation in order to maintain integrity of administrative process in its entirety). However, in Willy v. Coastal Corp., 855 F.2d 1160, 1169 at n. 13 (5th Cir. 1988), the Fifth Circuit noted the continuing vitality of Brown & Root within its jurisdiction.<sup>17</sup> The denial of certiorari

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<sup>16</sup>With respect to complaints filed after October 24, 1992, the CNEPA eliminates this issue by expanding the definition of discrimination in 42 U.S.C. §5851(a)(1), and thus the definition of protected activity explicitly to include internal complaints to an employer. Dean's and Lamb's complaints to the Secretary were filed May 26, 1992.

<sup>17</sup>In Brown & Root v. Donovan, *supra* at 1036, the Fifth Circuit held that "employee conduct which does not involve the employee's contact with a competent organ of government is not protected under section [210]." In Dunham v. Brock, 794 F.2d 1037, 1039-41, n.2, (5th Cir. 1986), the Fifth Circuit noted that Brown & Root involved only internal nonconformance complaints, but no NRC contact. On appeal in Dunham the employer asserted that Brown & Root was controlling because there was no direct evidence that the employer

by the Supreme Court in Kansas Gas & Electric v. Brock, *supra*, does not, as Claimants contend, resolve the issue against the Fifth Circuit's interpretation.

I find, however, that Dean's and Lamb's activities, both the complaints that were internal and those that were external to STP and HL&P, would, without exception, be protected activities under the Act but for the rubric of Brown & Root, which is distinctively applicable in the Fifth Circuit.<sup>18</sup>

Although certain concerns were initially expressed by Dean or Lamb or both of them to personnel within STP, in due course those complaints which are material to this case became the subject of investigations and actions by the NRC. Dean and Lamb repeated their complaints which had been initially made internally within STP to the NRC. Thus, it would be anomalous, where there is such a connection, to say that such activities at an early stage were not protected, so long as they were part of a process, and they were mirrored by, or evolved into, technically and legally protected activities, as defined by the Fifth Circuit, at a later stage. The activities in question had continuing vitality and effect from initiation to resolution. In this regard, to the extent that the internal complaints evolved into complaints to the NRC, they should be protected as an integral whole within the whole scope of complaints by employees "who are about to commence or cause to be commenced a proceeding or action." See Landers v.

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was aware that the complainant had initiated the NRC complaint, and the discharge stemmed only from the complainant's internal activity. The complainant asserted that his internal complaints fell within §210 because they mirrored his NRC complaint. The ALJ noted in his recommended decision that it was unlikely that the employer's management did not suspect the complainant as the NRC complaint's source. The Court declined to address the arguments in that case, but they are, in effect, presented again in the case at bar. In this case, as previously noted, HL&P categorically denies any knowledge of any protected activity by the Complainants involving communications with the NRC, although I find that the denial has occurred under circumstances which make it incredible.

<sup>18</sup>Some of the issues that the Complainants raised were ultimately vindicated by the NRC investigations. There is no allegation or evidence that any of the complaints were frivolous. In any event, it is well established that a complainant need not prove a violation of Federal safety laws or regulations to establish a violation of a whistleblower provision. See Pillow v. Bechtel Constr., Inc., *supra*, slip op. at 11, n. 6 (citing Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 356-57 (6th Cir. 1991)). Complainants' good faith, which is required, is not in issue, and I find was amply demonstrated on the record as a whole.

Commonwealth-Lord Joint Venture, 83-ERA-5, slip op. at 1 (Sep. 9, 1983).

It would thus be inaccurate to characterize any of the significant allegedly protected activities in which Dean and Lamb were involved as "purely internal," to the extent that they might have motivated HL&P's adverse action against the Complainants, because they all came eventually and intact within the purview of the NRC. See Brown & Root, supra at 1036. The conflict between the Secretary's position and that of the Fifth Circuit, regarding whether purely internal communications constitute protected activity under the ERA, thus, need not be reconciled in this case. The internal whistleblowing activities of Dean and Lamb, which evolved into and mirrored the complaints made to the NRC, and which would clearly be protected outside the Fifth Circuit and within the scope of the Secretary's policy, were so integrally and inextricably interrelated, both in subject matter and in temporal sequence, with the external and clearly protected activities involving the NRC, that they may be deemed to be an integral part of the activities involving employee contact with a competent organ of government which were clearly protected in the Fifth Circuit.

## 2) Knowledge

Whether knowledge of Dean's and Lamb's protected activities can be imputed to HL&P through any of its managers or agents who were responsible for the reorganization of NSD and terminations of Dean and Lamb is a critical element of this case. HL&P has categorically denied knowledge of Dean and Lamb's protected activities by Balcom or anyone else responsible for Dean's and Lamb's terminations. In such circumstances, proof of such knowledge is necessarily established by circumstantial evidence. See Bartlik, supra. Dean and Lamb need not prove that HL&P's final decision maker or decision makers had direct or actual knowledge that they engaged in protected activity in order to prevail. See Frazier v. Merit Systems Protection Bd., 672 F.2d 150 (D. C. Cir. 1982).<sup>19</sup> I find that Complainants have proved that HL&P had

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<sup>19</sup>While the principle for which Respondents cite Cosby v. Hughes Aircraft Co., 85-TSC-2 (Sec. Dec., Aug. 17, 1993), is unexceptional in the context of that case, the facts are so dissimilar as to render the authority inapposite. Cosby involved a discrete verbal threat by the claimant to file a lawsuit. The decision maker was not informed of that threat. This circumstance contrasts with the extended sequence of protected activity and the interactions in which Dean and Lamb were involved. The facts of the instant case also are in marked contrast to the facts in Bartlik, where the decision makers in a large organization of several thousand employees professed never to have heard of the claimant or his protected activity.



sufficient knowledge of their protected activities to act upon that knowledge, and did so, adversely to Complainants.

In the absence of proof of direct knowledge obtained through statements or admissions by the Complainants, HL&P managers and decision makers, or other persons with personal knowledge, knowledge imputable to HL&P may be established by proof that its responsible managers heard rumors, which generated suspicions, or made or acted on assumptions that Complainants had spoken to the NRC about their safety concerns. Proof is sufficient if Respondent's managers either were aware, or strongly suspected, that Complainant had complained to the NRC. See Pillow v. Bechtel Constr., Inc., supra, slip op. at 12-13; Williams v. TIW Fabrication Machining, Inc., 88-SWD-3 (Sec. Dec., June 24, 1992) slip op. at 6 (manager's suspicions that complainant had filed complaints with government agency were sufficient to show respondent's knowledge).

In this case the HL&P witnesses denied knowledge of Lamb's and Dean's protected activities, at least to the extent that they involved contacts with the NRC. But it is evident that by "knowledge" they meant virtually absolute certainty, that is the level of certainty that would be established by actual observation, documentary confirmation, or direct disclosure by a reliable person.<sup>20</sup> While none of them may have had that degree of certainty,

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<sup>20</sup> On deposition, Randlett testified that he remembered the investigation that was conducted by the OIG during the summer of 1991, and that the subject was the relationship between himself and Earnest, the NRC inspector, which was alleged to be improper. Asked if he knew who made those allegations, Randlett answered, "No, I do not." But he "had a suspicion . . . that it was either a security officer or someone within my own department. And it could have been someone like Dave Lamb." Though he denied that he "believed it was Dave Lamb," he then explained, in some of the most revealing testimony of the trial, "You asked me if I believed it was Dave Lamb. I couldn't believe that it was Dave Lamb. I could only suspect it was him or someone else within the department." Responding to the follow-up question, "[Y]ou suspected back in the summer of 1991 that it was Dave Lamb who had made those allegations, is that accurate?" Randlett replied, "Or someone he put up to it. That was my suspicion." Responding to the next question, "Your suspicion was at the very least he was behind it?" Randlett replied, "I didn't know that, but yes," and again repeated, "I didn't know." (Tr. 1191-94, Randlett) Randlett's response is indicative of at least one crucial management person's concept of "knowledge," and is for that reason important, even though Randlett had left STP at the outset of the reorganization. He testified that he had told the NRC in the course of the inspection that it did not surprise him that Lamb and Dean had been terminated, because they caused headaches for management at STP.

and so could categorically deny such knowledge, the record establishes that they were amply aware of circumstances, through investigations, discussions, and other interactions, as well as close familiarity with personalities in a small universe, which would have supported strong and reasonable suspicions, or assumptions, which could have affected, and, I find, did affect their conduct, which I find was also tempered by the caution that attends the involvement of legal counsel.

Knowledge may be imputed to HL&P and the decision maker if the ultimate decision maker has delegated the decision making authority and has ratified the decisions of the subordinates involved. Bartlik v. TVA, 88-ERA-15 (Sec. Dec., Apr. 7, 1993) n. 1. Proof is sufficient if it is established that an employee of the company "with authority to take the complained of action, or an employee with substantial input into that decision, had knowledge of the protected activity." Bartlik, supra at 4, n. 1.<sup>21</sup>

Complainants contend that relevant decision making authority was delegated by HL&P's Hall and Kinsey to Balcom. I so find, but I also find that the exercise of that discretion was influenced by the significant input of other managers. Complainants contend that "virtually all of the HL&P employees had knowledge of the protected activities," and so proof of knowledge was sufficient. (Claimants' brief at 7) Claimants contend that the knowledge of Hall, Kinsey, Moore, Balcom, and Jordan is imputable to HL&P, and that all of those men knew of Lamb's and Dean's protected activities. (Claimants' reply brief at 16)

Although the numbers may have fluctuated somewhat, the NSD consisted of approximately 22 personnel, exclusive of contract

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(Tr. 1198) The gist and tone of the other testimony of record implies, and I find, that Randlett's conception of "knowledge" was generally shared by STP's other managers. For example, Balcom's similar conception was disclosed when he was questioned as to whether he knew Lamb had gone to Speakout. (Tr. 1294-96, Balcom) An exchange with Drymiller was to similar effect. (Tr.A 107-08, Drymiller)

<sup>21</sup> Neither Atchison v. Brown & Root, Inc., 82-ERA-9 (Sec. Dec. Jun. 10, 1983), nor Frazier v. MSPB, 672 F.2d 150 (D.C. Cir. 1982) hold that knowledge can be imputed to a deciding official who has not delegated decision making authority or is not simply adopting the recommendation of a subordinate who did have knowledge. Those cases hold that, where managerial or supervisory authority is delegated, the official with ultimate responsibility who merely ratifies his subordinates' decisions cannot insulate a respondent from liability by claiming "bureaucratic 'ignorance'." See Frazier, 672 F.2d at 166. Bartlik, supra at 4, n. 1.

Wackenhut personnel. A substantial number of these personnel were involved directly or indirectly in matters raised by Lamb's and Dean's protected activities. In addition, there was the protracted and intensive process of dealing with the issues initially identified by Lamb and Dean, which became the subject of repeated internal and external investigations. The intensity of focus on these durable issues and the identification of those issues with Lamb and Dean, make it virtually impossible to believe that in a relatively small organization such as NSD, or indeed, STP, Lamb's and Dean's activities, including communications with the NRC, would not have been at least suspected by any responsible or informed person in such a universe and with an interest in the resolution of the issues or with dealing with the investigations and their consequences. Thus, Claimants' assertion, "The evidence established that virtually every witness in the case, including the principal decision makers had some degree of knowledge of Lamb's and Dean's engagement in protected activities," is persuasive.

Balcom categorically denied knowledge of Lamb's or Dean's involvement with the NRC. (Tr. 1432-33, 1435-37, 1487-88, Balcom) Under the circumstances of this case, including my assessment of the facts and the credibility of the witnesses, I find that denial to be incredible, at least to the extent that the denial encompassed knowledge which as a matter of law may properly involve awareness or reasonable suspicions grounded on less than the certainty of first hand observations. Balcom was an experienced and sophisticated manager. As head of QA he had previously performed audits of NSD. As QA manager in 1991, he administered the audit of NSD in the summer of 1991 that resulted in significant findings relating to the NSD, of which he advised Jordan. According to Jordan, these involved reconciliation of strongly opposing positions of Randlett and Balcom on the eve of the Tobin investigation. Balcom admitted that he learned during the audit that there were interpretive issues and disagreements between the NSD management and staff, and that, thereafter, Jordan sent him to discuss the problems with Randlett. (Tr. 2182-84, Jordan; Tr. 1329-30, Balcom) Balcom testified that while he was with QA he was aware of employee morale and discipline problems in NSD. (Tr. 1329, Balcom)

As and after he assumed control of NSD, Balcom conducted a lengthy, detailed, and largely secret personal evaluation of NSD and its personnel in deciding how to remedy what he perceived as its troubled condition. The investigation involved personal interviews with all personnel. Balcom sought their perceptions, except, perhaps oddly, in the case of Randlett, the head of NSD whom he replaced. Balcom testified that he declined Randlett's offer to give his personnel assessments to Balcom. However, Balcom solicited and received substantial and very significant input from Moore and Hinson. Randlett's attitudes and Balcom's thoroughness support a compelling inference that Lamb and Dean would have been linked to the interpretive issues and disagreements associated with

the NSD, since Lamb and Dean were major, if not the primary, instigators. Moreover, these early discussions between Balcom and Randlett at Jordan's behest probably obviated the need for Balcom to confer with Randlett after Balcom assumed the direction of NSD. By then, he probably knew what he needed to know about Lamb and Dean aided partly by Randlett, and, probably with the prescience instilled by the advice of counsel, would have tried to avoid any demonstrable taint from Randlett's well established hostility to Lamb and Dean.

Balcom denied learning that Lamb had gone to the NRC from Monteith or Cink, whom Lamb claimed he had told that he had gone to the NRC. (Tr. 1433, 1436, Balcom) Balcom testified that he had not learned that Lamb and Dean had opposed Randlett on the issues addressed in the Tobin Report as a result of the audit by QA which he directed prior to his assuming responsibility for NSD. (Tr. 1211-12, Balcom) Balcom denied knowledge of Speakout 11881, that Lamb and/or Dean had initiated 11881, or that they had taken the issues to the NRC until he prepared for trial. Balcom denied awareness of the investigative report regarding the Dean-Sheesley incident that mentioned Lamb and Dean having gone to Speakout. (Tr. 1297, 1346, Balcom) Moore testified that he never told Balcom about Dean's comment that he and Lamb had gone to Speakout. (Tr. 1635-36) Balcom denied receiving debriefing information from Jordan, and Jordan testified that he never knew the identities of the allegers, and had not discussed individuals and their positions on the debriefing issues. (Tr. 1295, 1336-37, Balcom; 2254, 2257, 2289, 2303, Jordan) Balcom took exception to the comment from Tapia in the OIG report that it was common knowledge at STP that Lamb, Dean, and Worth had gone to the NRC (Tr. 1487, Balcom; C-2)

Balcom's predecessor as head of the NSD, Randlett, resigned from STP one week after the Tobin report was released. He denied being asked to resign from the NSD. Randlett on deposition remembered being opposed to Lamb on the senior manager key issue, though he said he did not know Dean was opposed to that. He acknowledged that the issue was Lamb's and Dean's belief that a reduction in the physical security plans was involved, so that it did not comply with the regulations, and that sometime later there was a safety investigation of that issue. (Tr. 1185) Randlett also remembered a dispute with Lamb over whether there was a power outage, and later, whether there should be a test, and logging or reporting to the NRC. He testified that he did not recall Lamb's contention that the damage to the computer room door was a reportable event. Randlett was Lamb's supervisor during virtually all of the time that Lamb and Dean were conspicuously associated with these issues. He remembered that the NRC and the OIG were both on site during the summer of 1991 conducting an investigation; he said that fact was known by everybody in the NSD, and Kinsey knew they were there. (Tr. 1185-88, 1195, Randlett)

Randlett testified that he had complained to Kinsey on two occasions that Lamb was trying to undermine the NSD. Randlett also testified that he suspected that Lamb or one of his subordinates had been to Speakout on some other issues, because "some of the issues had been brought up by him previously. And he was still boisterous about some of the issues." This testimony explicitly establishes the linkage between Dean and Lamb and the particular issues that could be appreciated by the interested and responsible managers at STP. Randlett also admitted that "it didn't surprise [him] that Lamb and Dean had been terminated, because they caused headaches for management at South Texas." (Tr. 1196-98, Randlett)

The Tobin Report was the product of an NRC investigation. It found several specific and well defined violations by STP of security requirements. Specifically, it found violations with respect to the handling of the management key issue and the power outage issues. These had been, and continued to be, high profile issues over which Lamb had vehemently and persistently disagreed with Randlett, had complained to higher management authority, had complained to the NRC, and had cooperated with the NRC during the investigation. Dean worked with Lamb on this issue. Because of the continuum of focus and activity, Lamb's and Dean's involvement was part of an integrated whole, comprising protected activity from inception, the time of their initial disagreement with Randlett, through their various communications with NRC personnel, which ultimately forced STP to deal with the adverse assessments by the NRC.

Alternatively, if Lamb's and Dean's protected activity were deemed to qualify when Lamb or Dean first had contact with the NRC, those prior activities would of necessity be considered an integral part or mirror of the whole process. Both men were clearly identified with those highly visible issues. This was clear to the other employees with whom they were associated or came into contact. The issues came within Lamb's, and also Dean's, expertise. They were within Lamb's supervisory responsibility. His position with regard to them generated conflict with at least certain of his superiors. Randlett was no longer at STP when Balcom reorganized NSD and terminated Lamb and Dean, along with Worth. However, the reorganization was a response to Randlett's legacy. By inference, Randlett's attitude toward Lamb and Dean was indicative of management's attitude toward them, at least to the extent that it recognized their roles as whistleblowers within the organization. In that sense, Balcom would have been concerned, as Randlett was, at their current and prospective roles within NSD.

Lamb, Dean, Worth and Neal made security related and misconduct allegations to HL&P management, STP Speakout, and the NRC. Their allegations pertained to matters under the regulatory jurisdiction of the NRC. HL&P managers Randlett, Balcom, Moore, Kinsey, and Hall all had some degree of knowledge that one or more individuals in the NSD had made allegations to Speakout and/or the

NRC.<sup>22</sup> Randlett suspected Lamb of making allegations dating back to a May 1991 NRC inspection, and, as a result, complained on at least two occasions to Kinsey about Lamb's attempts to undermine the NSD. Dean admitted in Moore's presence during a November 1991 disciplinary action that he and Lamb had previously raised concerns to Speakout. Balcom learned in February 1992 that Lamb had brought a recent concern to Speakout, although, according to Balcom, the matter did not involve security concerns directly pertinent to this case. (Tr. 1294-96, Balcom) Also in February 1992 Balcom was advised by Lamb and Neal that the Tobin Inspection Report, contained false statements. Lamb's and Neal's disclosure to Balcom that there were inaccuracies in the Tobin report, which Balcom then discussed with Kinsey, would have notified Balcom that Lamb and Neal had been to the NRC, because the Tobin report had been under lock and key. Since all supervisors except Randlett and Hinson had been denied access to the document, the only way Lamb and Neal could have got a copy would have been as alleged, a fact that could not readily have escaped a manager of Balcom's experience and sophistication. (Tr. 306, 308, Lamb; 1100, Kinsey)

Respondents assert that the date of the Randlett-Kinsey discussion is not disclosed by the record, but that the record does show that the discussion was not related to the Randlett-Earnest relationship. Respondents also assert that there is no evidence that this relationship was of particular concern to HL&P management. The Jordan Report did not treat the issue, but was directed toward particular security procedures. Hall and Randlett claim, for example, that they did not see the OIG Report, and did

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<sup>22</sup>Drymiller was asked whether, based upon Lamb's and Dean's longstanding opposition to Randlett on certain issues, it was not "pretty clear that management knew that they had been to the NRC." After an initial negative answer, and some further inquiry by counsel, Drymiller responded to the question, "Isn't it true, sir, that based on your observations, based on the fact that they had made those oppositions for years, that management knew that they [Lamb and Dean] had been to the NRC?",

A I don't know that management knew that any of us had been to the NRC.

Q You suspected they did, don't you, Mr. Drymiller?

A That's certainly a possibility, just as it would be for my own case.

Q That's what your supposition is, based on your observations, isn't it, Mr. Drymiller?

A As I said then and I say now, a number of us went to the NRC. There were a number of problems within the security department. It's entirely possible that they -- that management suspected that any of us could have gone to the NRC. (Tr.A 107-08, Drymiller)

not discuss it with anyone. (C-49, 51; HL&P-130; HL&P-158 at 19-20, Randlett; C-2 at 21-22; Tr. 1041-45, Hall) It is implausible, however, that this issue involving the Randlett-Earrest relationship was not significant, because it caused not only the OIG inspection, which was unusual and would have been known to involve potential misconduct by an NRC employee, but it engendered the Jordan Report, the debriefings, and various other significant responses from STP and demands upon its resources. In addition, NRC Region IV management contacted Hall in November or December 1991 regarding a possible grievance action involving the NRC inspector who previously conducted security inspections at STP. This made it probable that someone in the NSD had complained to the NRC about the inspector's conduct. As a result, Kinsey wrote a memorandum directed to the Licensing Department of STP and the NSD advising them of possible NRC contact. Further, an STP employee and the NRC Senior Resident Inspector at STP told OIG that it was common knowledge that Lamb had been talking to the NRC. Regardless of the merits of the issue, it is implausible that STP management would not have been concerned with who and what caused the inspection to happen.

The opinions of Lala, Williams, Pomeroy, Drymiller, Neal, Smith, and Boone are properly considered with respect to Respondent's knowledge of Claimants' protected activities and HL&P's allegedly retaliatory motive for terminating them. Lala testified that he was aware that Lamb and Dean had gone to Speakout and that he had also heard that they had been to the NRC. (Tr. 1946-47, Lala) Lala described general knowledge, and Lamb's concern with safety violations and indication that he had to take the concerns forward. He described rumors that Lamb had been to the NRC. (Tr. 2021-22, Lala)

Boone testified that it was common knowledge that Dean and Lamb had been to Speakout and/or the NRC, but he meant that they had been interviewed, and not necessarily that they had "initiated concerns," which he did not know for a fact. (Tr. 2694-96, Boone) Pomeroy testified that he knew of the protected activities of Lamb and Dean, that Balcom knew of the types of concerns that they had been voicing, and that he believed that they were terminated because they took their concerns to Speakout or management. Pomeroy testified that he believed that Balcom was responsible for the retaliation, and that Balcom knew of Dean's and Lamb's protected activities, because Lamb and Neal, as supervisors, told Balcom about the inaccuracies in the Tobin report. (Tr. 679-80, Lamb; 2069, 2116-18, Pomeroy)

Neal knew that Lamb and Dean went to the NRC because he was with them. He had also been pulled by Lamb into Drymiller's office where Lamb told him and Drymiller that he thought he would be fired for going to the NRC. Neal also testified that Lamb had told him that Kinsey and Balcom would not speak to him. (Tr. 2921-22, Neal) Smith believed that Lamb had been to Speakout and the NRC, and

believed that it was common knowledge within certain circles at STP that Lamb had been to NRC, because he had conversations to that effect with others in NSD. (Tr.A 192-94) Worth knew of Lamb's and Dean's protected activities, because he participated in those activities with them. It was his opinion that Lamb's and Dean's protected activities got them fired. (Tr.A 24, Worth) Tapia, the Senior Resident NRC Inspector at STP believed that it was common knowledge at STP that Lamb, Dean, and Worth had been to the NRC with their safety concerns. (C-2 at 30) While this generally credible testimony does not prove that particular members of management necessarily knew of the protected activities, it does tend to prove the existence of an environment which corroborates and strengthens the inference that knowledge was derived by management from the conditions and circumstances which generally obtained at STP.

These witnesses established the requisite rationally based perception and the aid to understanding the issues required for admissibility of their opinions by 29 CFR §18.701. The perceptions of these witnesses were based on observations of management practices at STP over time, and communications with their fellow workers. Confusion over the meaning of "common knowledge" would not render their opinions inadmissible. What is not clear, however, is how representative and unbiased, and therefore, how reliable their opinions and observations are. But their testimony establishes that there were employees of HL&P who were well situated to know who held those opinions.

In this regard, Complainants cite Boone's testimony that he knew that Lamb and Dean had been both to Speakout and to the NRC with their concerns regarding regulatory violations. (Tr. 2665-66, Boone) He testified that Lamb and Dean were not secretive in this regard, and had told him, and that others knew it as well. Boone testified that to his knowledge at least six other persons in the NSD knew of these activities. (Tr. 2666, Boone) In this regard, it is significant that there were approximately seventeen people in the NSD, and that in addition to Boone, Neal, Gregg, Worth, Moore, and Drymiller knew that Lamb and Dean had been to the NRC. (C-13 at 68, Moore) Complainants assert that such a breadth of knowledge supports the conclusion that knowledge of Claimants' communications with the NRC was "common knowledge." Drymiller knew that Complainants had contacted the NRC, because Lamb told Drymiller that the NRC wanted to talk to him. (Tr.A 134, Drymiller)

I find that Kinsey knew to at least some degree of Dean's and Lamb's protected activities, because he testified that as Vice-President of Nuclear Generation he was responsible for the NSD; he met with his subordinates, including Randlett, Hinson, and Moore, on a daily basis; he was required to keep abreast of what was going on in the NSD and to talk with his subordinates about developments in the NSD. (Tr. 1081-84, Kinsey) Moreover, Dean testified that he specifically discussed his opposition to Randlett on the management



key issue with Kinsey, and explained that he believed that the change would violate both applicable regulations and the physical security plan. (Tr. 713-14, Dean) This conversation occurred in 1988, and Kinsey did not deny that it had occurred, although he testified that he did not recall it. (Tr. 1085, Kinsey) Kinsey was involved in the Nuclear Safety Review Board's discussions of the management key issue. A review of the documents pertinent to that issue would have disclosed Lamb's opposition to the proposed change, since Lamb refused to sign off, and wrote a memorandum to the file stating his opposition. (C-1) Kinsey testified that Randlett told him of his staff's concern regarding the propriety of the change. (Tr. 1088, Kinsey) Kinsey admitted that Randlett might have told him of Lamb's and Dean's opposition. (Tr. 1116, Kinsey) Kinsey had seen the report on Concern 12204, which alleged that Lamb was retaliated against over the management key issue, but he testified that he did not specifically recall that Lamb "was -- one of the trouble makers of the key issue." (Tr. 1118-19, Kinsey; HL&P-13) Though he professed not to recall Randlett's use of the word "undermine," Kinsey recalled Randlett's telling him that he thought Lamb "was making accusations about him and that he would be going to jail and lose his job. (Tr. 1089-90, 1115-17, Kinsey)

With regard to the ensuing Speakout investigation of the issues, including the management key issue, which Lamb and Dean had been raising, Kinsey testified that he was aware that someone had been to Speakout on the key issue, and that he had speculated that it might have been Lamb going to Speakout with these violations. Kinsey thought that, as a probable result of conversations with Speakout personnel or Randlett, he had become aware that someone had to be going to Speakout with regard to the management key and power outage issues in the summer of 1991 when the Tobin investigation took place. (Tr. 1111-15, Kinsey) Kinsey also received and reviewed the report generated on Speakout Concern 12204, which referred to Concern 11881, which had been filed by Dean and prepared with Lamb's assistance. It also referred to the allegation that Lamb was retaliated against for opposing Randlett on the management key issue. (Tr. 1111, 1113, 1115-16, 1118-19, Kinsey; HL&P-13; C-16) Kinsey's involvement in the documentation of Dean's altercation with Sheesley, and his related review of the investigation materials and report, led to his admitted knowledge that Dean had been to Speakout and to the NRC. (Tr. 1120-21, Kinsey) Kinsey also admitted that Randlett had told him that he, Randlett, believed that Lamb was making accusations against him and undermining the NSD.

I find that Kinsey had the authority to terminate Lamb and Dean and that he delegated that authority to Balcom, who effected the terminations, which were approved by Kinsey. Kinsey, in effect, had selected Balcom to succeed Randlett as head of NSD, even though Balcom had no security training or background, which was of concern to Hall. Kinsey had a long and close working

relationship with Balcom. In that sense Balcom was, in effect, acting as Kinsey's agent or delegate.

Kinsey discussed the direction he wanted NSD to take under Balcom, and Balcom cleared his reorganization proposals in detail with Kinsey and Hall, obtaining their approval. Balcom insisted that he never discussed any people when he met with Kinsey and Hall, although he discussed "manloading," or the number of people. Although Balcom testified that he could not have discussed what individuals were going to lose their jobs, I find it impossible to believe that in discussing a unique and carefully contrived downsizing of a small, technically specialized department, whose personnel were thoroughly familiar to the decision makers, there would not have been discussion of whose talents might be lost and why, unless there was a tacit understanding that would have obviated the necessity for such a discussion, or they were professionally irresponsible. (Tr. 1151-53, Kinsey; 1228-29, Balcom)

Management's concerns about legal consequences of such action, revealed in Hall's direction to Balcom to work with HR, and which were also revealed in connection with the handling of the Dean-Sheesley incident a few months before, as well as Hall's and Balcom's resort to the STEP device, shows that these management personnel were thoroughly sensitive to the risks of targeting employees for adverse action. Indeed, there is an inference that can be drawn from Hall's testimony that the handling of the incident would have identified Dean as a whistleblower. (Tr. 1003-09, Hall) And Kinsey testified that his recommendation to Hall was colored by the lawyers' concerns that Dean felt he was being retaliated against and that there was a risk of whistleblower litigation as a result. (Tr. 1120-22, Kinsey) These managers also knew each other well enough so that a tacit understanding would have been a plausible substitute for overt discussion.

I find that Jordan, who was the General Manager of Nuclear Assurance at all relevant times, likewise, had knowledge of the protected activities of Lamb and Dean. He oversaw QA audits of the NSD, and Balcom, before his transfer from QA manager to NSD, reported to him. Jordan discussed the problems in NSD with Balcom when Balcom was QA manager, and sent Balcom to discuss with Randlett the problems facing the NSD, including the management key and power outage issues, which were set out in HL&P-130. Jordan was charged by Hall with investigation of the "interpretive issues" related to NSD, in which Lamb and Dean were deeply and conspicuously involved.. (Tr.A 248-53, Jordan; Tr. 964, Hall; 2182-84, Jordan; HL&P-130) In addition, Jordan participated in the debriefings of all personnel interviewed by the OIG, which was investigating the allegedly improper relationship between Randlett and Earnest, and related issues. He would have learned that Lamb, Dean, Worth, and Neal told the OIG that there was such an improper relationship between Earnest and Randlett, unless he had insulated himself

artificially, because the credibility and significance of the allegations would have depended upon the source or sources, and the issue related to the basic integrity of the security system. (C-70)

Jordan testified that he obtained a copy of Speakout Concern 11881 from Cink and investigated the issues involved in the concern. He was also involved in the development and investigation of Speakout Concern 12204, which had been initiated by Worth, following detailed inquiry and discussion by Jordan with Worth concerning "inappropriate management issues and reporting of security incidents and events and improper handling of security incidents by security management." That concern makes specific references to Lamb's involvement in the management key issue, his opposition to Randlett, and that he was routinely mentioned with respect to retaliation. (Tr. 2176-85, 2253-55, Jordan) Jordan, like Kinsey, was involved in the selection of Balcom to head NSD, and testified that he was confident that Balcom would be able to eliminate the problems of the type that NSD had been experiencing. (Tr. 2308-09, Jordan) Those problems involved Lamb's and Dean's dissents from decisions by management. As Claimants contend, Jordan could not have failed to make the connection between Lamb, and probably Dean, and these issues, and subsequently between Lamb and Dean, these issues, and the Tobin investigation of the same issues that Lamb and Dean had been raising, and had discussed in their debriefings, if not with absolute certainty, with little room for doubt. (Claimants' brief at 46)

In a different context, Balcom engaged Hinson and Moore to prepare the SPP forms which were used to justify the terminations of Lamb and Dean, allegedly under the STEP process. Hinson rated Worth; Moore rated Lamb and Dean.<sup>23</sup> Thus, Hinson and Moore had

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<sup>23</sup>Balcom designated Hinson to fill out SPP forms, despite his transfer to the Licensing department, because Balcom thought he had the most knowledge of the personnel he evaluated. Balcom testified that he was unaware that Hinson "had previously been disciplined for harassing workers for reporting regulatory violations," either when Hinson was selected to do the evaluations or at the time of the hearing. Balcom had reviewed the NSD personnel files, however. Hinson's file contained a firm and final warning for an unprofessional response by him to an employee's concern regarding the operability of certain security equipment. The gravamen was that he had trivialized the concern and humiliated the employee. Balcom's denial was not convincing, and involved a measure of sophistry. Moreover, it is also significant that the employee in question was Worth, who was evaluated by Hinson, at Balcom's behest, and who was terminated when Dean and Lamb were as part of the reorganization of NSD. (Tr. 1239-47, Balcom; C-69) Subsequently, Balcom testified with respect to certain inconsistencies in the SPP rankings of Worth and Brick, "I asked Mr. Hinson why he had rated Mr. Worth what he had, and his comment was, that because he was reluctant to follow management's

substantial input into the decision to terminate Lamb and Dean. Subject to what he called a "sanity check," and the resolution of certain inconsistencies, Balcom adopted their rankings, at least partly because he professed a lack of current knowledge, and so he deferred to Hinson's and Moore's greater knowledge, rather than make the choices himself.<sup>24</sup> (Tr. 1422-25, 1429, Balcom)

Moore's awareness of Lamb's and Dean's activities extended at least from 1988 through their terminations in May 1992. He knew of their opposition to Randlett on the Management key issue, and heard them voice their concerns that violation of regulations was involved. Moore received Lamb's memo stating his concerns over the management key issue. Moore testified that Lamb's and Dean's opposition and belief that management was violating regulations in this regard was well known within NSD. Moore, who identified himself as management, testified that concerns regarding noncompliance with regulations that Dean and Lamb had been raising had been causing management problems for years. Moore was also involved in the Speakout investigation of Speakout Concern 11881 which focused on issues he knew Lamb and Dean had been raising. Moore testified that he knew that both Lamb and Dean had been to Speakout. (Tr. 1503-09, 1559-61, Moore; C-16) The DOL investigator Perez recorded an admission by Moore during an investigative interview that he was aware during the fall of 1991 that Lamb and others had brought allegations to Speakout and the NRC. (C-13 at 68; Tr. 1562, 1566, Moore) In assessing what Moore "knew," it is significant that he disclaimed knowledge that Balcom intended to

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directions. I said, we need to make that consistent with the way we rated Mr. Lamb. So, we adjusted his performance up, and did the same to Mr. Worth as we did with Mr. Lamb." (Tr. 1342, Balcom) It should be noted that Lamb was a supervisor, Worth was not. This evidence reveals problems of fairness in the evaluation process, management's perceived linkage between two whistleblowers, and the importance to HL&P of acquiescence to management in the evaluation process.

<sup>24</sup>A predictable and tacit meeting of minds is disclosed by Balcom's revealing answer to the question, "You were also able to determine from those lists [the initial rankings of personnel prepared by Moore and Hinson] for sure whether or not Mr. Hinson or Mr. Moore agreed with you who ought to be eliminated, correct?" Balcom responded, "That's not what I did. I guess that one of the ways you could say what you're saying is that in that process, I determined that we all had a similar understanding. People were in their relative positions on the list within one, two or so." (Tr. 1227, Balcom) Such an understanding reflects a tacit agreement or understanding which would form the basis for Balcom to predict the outcomes of the impending evaluation process.

shrink the NSD, but "assumed" that NSD was going to be shrunk. Moore also assumed that the reorganization was going to result in terminations. (Tr. 1528-31, Moore) I find that such assumptions, under the circumstances, were tantamount to knowledge that these events would take place, and that Moore's judgments and actions were based upon, or would have been significantly affected by those assumptions.

### 3) Adverse Action

HL&P's termination of the Complainants is clearly an adverse action against each of them, and I find that Complainants have proved this element of the requisite prima facie case and their claims.

### 4) Causation - The Nexus Between Protected Activity and Adverse Action

There is no requirement that HL&P, as the employer, have knowledge of the full scope and detail of Dean's and Lamb's protected activities, if it had sufficient knowledge of the activity in general and of the activity qualifying under Brown & Root in particular to provide an impetus for the terminations which occurred. See Francis v. Bogen, Inc., 86-ERA-8 (Apr. 1, 1988). In this case, there is a categorical denial by HL&P of any knowledge whatever of the protected activity by Balcom or any of the other decision makers who had any role in Dean's and Lamb's terminations. However, there is convincing evidence that HL&P's managers gave the term "knowledge" an artificially constricted and self-serving interpretation, when there were sufficient indicia of protected activities to generate serious suspicions and inferences that could readily provide an appreciable incentive to act adversely against the Complainants, and to effect their terminations, however cleverly devised the process.

Complainants terminations are indisputably adverse actions by the Employer against its employees. Complainants may establish a prima facie case of discrimination if they have demonstrated a sequence or pattern of suspicious circumstances from which a reasonable inference may be drawn that their terminations were effected in retaliation against the protected activity. See Mackowiak, supra at 1162. HL&P categorically denies that Dean's and Lamb's protected activity affected in any way the decision to terminate them in May 1992. Obviously, the presence or absence of a retaliatory motive would be "provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such improper motive." Ellis Fischel State

Cancer Hospital v. Marshall, 629 F.2d 563, 566 (8th Cir. 1980), cert. denied, 450 U.S. 1040 (1981); Mackowiak, supra at 1162.<sup>25</sup>

To the extent that STP's problems with security issues could be traced to Dean's and Lamb's concerns, and their persistent refusal to acquiesce in the decisions of management which they believed to be erroneous, and which later became the subject of NRC investigations, HL&P would have wanted to eliminate those two employees under a new regime. If this incentive did not stem from any particular concern of Lamb's and Dean's, it would have stemmed from the cumulative effects of those concerns and how Lamb and Dean pursued those concerns. Those concerns generated the internal and external investigations of STP with their attendant pressures. They focused STP's and NRC's attention on NSD, and Randlett's shortcomings as an administrator. These factors surely caused Randlett's departure from STP, even if he was not actually forced out. Randlett's departure opened the way to a reorganization by a new manager who had the confidence of higher management, a new regime, and, if convenient, a related reduction in force, all of which occurred. The chain of events that led to Balcom's assumption of authority, and the remedial actions he took to deal with what he perceived as the unsatisfactory conditions within NSD, and led to his reorganization of NSD, thus support the inference that they were causally related to Lamb's and Dean's concerns and their persistence in seeking vindication of those concerns.<sup>26</sup>

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<sup>25</sup> A terminated employee must provide additional direct, circumstantial, or statistical evidence that an improper discriminatory element was a factor in his termination. See Simpson v. Midland-Ross Corp., 823 F.2d 937, 941 (6th Cir. 1987)(quoting LaGrant v. Gulf & Western Mfg. Co., 748 F.2d 1087, 1090-91 (6th Cir. 1984)). Temporal proximity of the adverse action to the protected activity may be sufficient to establish causation. See Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989), cited in Pillow v. Bechtel Constr., Inc., supra, slip op. at 13. Complainants contend, for instance, that such interrogation of employees regarding protected activities as occurred when Jordan and Gutterman debriefed the employees who had been interviewed by the NRC's OIG has been held to be an indication of a discriminatory motive. See Dartey v. Zack Co., 82-ERA-2 (Sec. Dec., 1983) slip op. at 10.

<sup>26</sup>In his statement prepared with advice of counsel for the NRC, Balcom stated, "I was already aware that the Nuclear Security Department was facing employee, morale and disciplinary problems." He explained in his testimony, "By disciplinary problems, I meant it more of an organizational discipline, type of structured approach to doing business. We had found, for example, Mr. Randlett to be in the last QA audit...not as amenable to sitting down and working with us. It became obvious...that there were some interpretive issues out there that were disagreements between the

I find that Complainants produced ample evidence to support an inference that HL&P retaliated against them because of their complaints to the NRC. The issues that concerned them were well defined and durable. These issues, which, for the most part, started as conspicuous expressions of security concerns by Lamb and Dean to HL&P management at STP, became the subject of NRC investigations in which HL&P managers were intensely involved and to which they were compelled to respond with a substantial commitment of resources. The two Complainants were continuously and conspicuously associated with these issues as they developed from late 1988 through the spring of 1992. Among their responses, HL&P's managers conducted their own investigations of the problems. Key managers either knew or suspected that the Complainants had to some degree caused these investigations by communicating with the NRC, because of the issues involved, and because of the interactions of closely associated STP personnel within the company and with the NRC.

The process that led to Complainants' terminations began days after the last NRC report was completed and issued, and involved to some degree virtually all of the key managers at various intervals then and thereafter. That process, unique in various respects, raised serious questions as to its impartiality and the necessity of its selection and use. Those three who were terminated, Lamb, Dean, and Worth, were the most conspicuous and persistent whistleblowers who challenged management with their concerns related to security issues. The manner of their discharge was abrupt, if not brutal. Thus, the inference that the adverse actions against the Complainants, Lamb and Dean, were motivated, at least in substantial part, by their protected activities, and HL&P's knowledge of those activities, is reasonable and soundly

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staff and the management. That's the kind of what I meant by that, from an organizational discipline, not to be confused with individual disciplinary functions or personnel discipline. He answered the question, "So, you viewed the disputes between staff and management over interpretive issues as disciplinary problems?" by stating, "What I call organizational discipline, the way that they did business. Inability to resolve those disputes in-house, or in the organization. They didn't appear to have a very structured approach to resolving those issues." (Tr. 1329-30, Balcom; C-75C) Obviously, what Balcom saw was that neither Randlett nor Dean and Lamb would acquiesce; the issues festered; and if the disputants were eliminated, "discipline" could be restored. The disputes, however, were over what Dean and Lamb considered to be management's unjustified refusal to abide by or enforce security regulations, and they were largely vindicated by the NRC.

based.<sup>27</sup> I find that Complainants have established a prima facie case that their terminations violated the employee protection provision of the ERA.

### Rebuttal

If Complainants establish their prima facie case, as I find that they have, Respondent must introduce evidence which, if believed by the trier of fact, would suggest a finding that a legitimate nondiscriminatory reason was the cause of the adverse employment action. See St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2747 (1993); Carroll v. Bechtel Power Corp., supra, slip op. at 9-12; Dartey v. Zack Co. of Chicago, supra, slip op. at 8. Such proof must be satisfied with specific evidence and corroborating documents. Priest v. Baldwin Assoc., 84-ERA-30 (Sec. Dec. Jun. 11, 1986) slip. op. at 12-13. Respondent has produced evidence of a legitimate, nondiscriminatory reason for the terminations, which is the reorganization of NSD and reduction in force purportedly justified by business considerations. Respondent has thus satisfied its burden of production, "the rebuttable presumption created by the prima facie showing drops from the case," and "the answer to whether the plaintiff presented a prima facie case is no longer particularly useful." See Carroll v. Bechtel Power Corp., supra, slip op. at 11, citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 255, n. 10. St. Mary's Honor Ctr. at 2748; Goldman v. First Nat'l Bank, 985 F.2d 113 (1st Cir. 1993).

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<sup>27</sup>Respondent asserts that many NSD employees openly disagreed with management positions on many issues frequently, and that management did not know or care which employees had taken issues to Speakout or the NRC. (Tr.A 21-22, Worth; 104-05, 107-08, Drymiller; Tr. 965, Hall; 2250, Jordan; 2913, 2916, 2921, Neal; 2045-46, Pomeroy; 1486-87, Balcom; 1508-09, 1607-13, Moore; Respondent's reply brief at 5) The contention is beside the point, because there is no showing that any of those employees were as conspicuous or persistent as Lamb and Dean, or that their concerns were as well founded, or as traceable, or had the significant and burdensome consequences of those pursued by Lamb and Dean. More likely, such employees would have disagreed, and then, like Moore, simply accommodated to the decisions of management. (Tr. 1694-97, Moore; C-1) Under such circumstances, there would have been little or no incentive for HL&P to retaliate.

On the other hand, the assertion would have been wrong at least in some instances. For example, Drymiller responded to the question, "You believe that Mr. Randlett retaliated against you for pointing out regulatory violations to him, don't you?", "Yes." He cited a specific example. However, he denied knowledge of other occasions. The fact that Drymiller was an employee of HL&P when he gave this testimony, and Balcom was the corporate representative present at the hearing, cannot be ignored. (Tr.A 108-09, Drymiller)



Complainants have the ultimate burden of persuasion, which requires them to prove that the reason articulated by HL&P was pretextual, and that the real motive for the adverse actions was retaliatory, or intentionally discriminatory on a forbidden basis. See St. Mary's Honor Center v. Hicks, supra; Pillow v. Bechtel Constr., Inc., 87-ERA-35 (Sec. Dec. Jul. 19, 1993), slip op. at 14, n. 10.<sup>28</sup> If, however, a respondent employer's adverse action against an employee was motivated by both prohibited and legitimate reasons, the dual motive doctrine applies, and the respondent employer must prove by a preponderance of the evidence that it would have taken the same action concerning the employee, even in the absence of the protected activity. See Pillow v. Bechtel Constr., Inc., supra, slip op. at 14-15 (citing Dartey, slip op. at 8-9); Mackowiak, 735 F.2d at 1163-64; Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977); Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989)(plurality

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<sup>28</sup>The complainant always bears the burden of providing by a preponderance of the evidence that retaliation was a motivating factor for the respondent's action, and may carry that burden in part by showing that the respondent's articulated reason was pretextual. However, it is now settled that in Title VII cases, and by analogy in ERA cases, rejection of the Employer's asserted legitimate, nondiscriminatory reasons for its challenged actions as pretextual, nevertheless does not relieve the complainant of the obligation to prove intentional discrimination, although the fact finder's disbelief of the reasons advanced by the employer may, together with the elements of the prima facie case, suffice to show intentional discrimination, and permit the trier of fact to infer the ultimate fact of intentional discrimination. See St. Mary's Honor Center, supra; Carroll v. Bechtel Power Corp., supra, slip op. at 10; cf. Ashcraft v. University of Cincinnati, 85-ERA-7 (Sec. Dec. Nov. 1, 1984). It is not clear whether, under this rule as it would apply to this pre-CNEPA complaint, the principle, that the employer bears the risk that the influence of legal and illegal motives cannot be separated, would have continuing vitality. See Mackowiak, 735 F.2d at 1164; Guttman v. Passaic Valley Sewerage Comm'rs, 85-WPC-2 (Sec. Dec. Mar. 13, 1992), slip op. at 19, affirmed sub nom. Passaic Valley Sewerage Comm'rs v. Martin, 992 F.2d 474 (3d Cir.), cert. denied, 114 S. Ct. 439 (1993). If it were viable, it might apply to Complainants' advantage in this case. However, it is not deemed necessary on this record to rely upon that principle. I note that the amendments subsequently enacted by CNEPA provide in 42 U.S.C. §5851(b)(3) that, if the employee establishes that the protected activity was a "contributing factor" to the adverse action, the employer must demonstrate by "clear and convincing evidence," rather than a preponderance of the evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior. I would find that HL&P has not satisfied this measure of proof.

opinion). In this regard, Complainants must still prove that it is more likely than not that discrimination motivated Respondent's action. DeFord v. Secretary of Labor, *supra*; House v. TVA, 91-ERA-42 (Sec. Dec. Jan. 13, 1993, slip op. at 4); Bartlik v. TVA, 88-ERA-15 (Sec. Dec. Apr. 7, 1993).

A complainant may carry his burden of proof by direct or circumstantial evidence. See United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 709, 103 S. Ct. 1478 (1983); Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563, 566 (8th Cir. 1980) *cited in* Bartlik at slip. 3. Disparate treatment evident in the employer's actions is particularly material to proof of legitimate and illegitimate motives. See Donovan ex. rel. Chacon v. Phelps Dodge Corp., 709 F.2d 86 (D.C.Cir. 1983). If direct evidence of discrimination exists, and it is not effectively rebutted, a respondent can avoid liability only by showing it would have taken the same action in the absence of protected activity. Blake v. Hatfield Elec. Co., 87-ERA-4 (Sec. Dec. Jan. 22, 1992, slip op. at 5-6).<sup>29</sup>

In the Fifth Circuit where these claims were brought, the applicable law is unsettled in significant respects. The Circuit has not determined the appropriate allocation of the burden of persuasion in a retaliatory-discharge case under Section 210 of the ERA. See Dunham v. Brock, 794 F.2d 1037, 1039 n. 2 (1986). Nor has the Circuit decided whether to apply to whistleblower claims under the ERA the shifting burden test for dual-motive discharge cases established in the First Amendment retaliatory-discharge case of Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287, 97 S. Ct. 568, 576 (1977), as applied in Consolidated Edison Co. of New York v. Donovan, 673 F.2d 61, 62 (2d Cir. 1982); Mackowiak v. University Nuclear Systems, Inc., *supra* at 1163-64. Nonetheless, following the decision in St. Mary's Honor Ctr., *supra*, it may be assumed that the Claimant must ultimately meet the burden of establishing that the discharge was discriminatory. In fact, such an interpretation appears consistent with the Fifth Circuit's standard in Title VII retaliation cases that requires the plaintiff to show that "but for" the protected activity, the termination would not have occurred, notwithstanding the other legitimate reasons advanced by the defendant. Jack v.

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<sup>29</sup>It is also significant that the Employer's action in this context should be construed broadly in conformity with the essential purposes of the law, one of which was to "prevent employers from discouraging cooperation with NRC investigators, and not merely to prevent employers from inhibiting disclosure of particular facts or types of information." See DeFord, *supra* at 286. In an analogous context the Fifth Circuit has construed an employer's action broadly to prevent intimidation of others in the exercise of their rights. See NLRB v. Mount Desert Is. Hosp., 695 F.2d 634, 638 (5th Cir. 1984).

Texaco Research Center, 743 F.2d 1129, 1131 (5th Cir. 1984).<sup>30</sup> As discussed, infra., I find that the Complainants have met the required burden and have established that, but for their protected activities, they would not have been terminated, and that their terminations were the result of discriminatory actions by HL&P motivated by their protected activities which culminated in their contacts with the NRC.

#### Pretext/Dual Motive

Complainants contend that HL&P's reorganization of NSD was a mere pretext for the elimination of employee disagreement such as theirs with management decisions. In the alternative, they contend that HL&P had a dual motive for their terminations. There is evidence which would support the inference that the reorganization was pretextual. However, the evidence viewed as a whole establishes that any need for the reorganization itself was largely a response to the pressures that Dean and Lamb had been generating and a perceived need to eliminate the fountainheads of those pressures, especially those related to the NRC. Nevertheless, the reasons HL&P has stated for the reorganization of the NSD are sufficiently plausible to require consideration of the dual motive doctrine.

An analysis of the "dual motive" possibility is required under circumstances in which the adverse action might have been motivated by two factors, one legitimate and one prohibited. See Francis v. Bogan, supra at n. 1; Palmer v. Western Truck Manpower, 85-STA-6 (Sec. Dec., Jan. 16, 1987). Under the rule in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), an employee must show that the adverse action taken by the employer was, more likely than not, the result of the protected activity. The legal standard for "dual motive" discharges under the ERA, is explained in Mackowiak. As noted above, once it is found that retaliation "was at least a motivating factor" in a discharge, and that the employer also had legitimate business reasons to terminate the employee, the test for "dual motive" discharges developed in Mt. Healthy applies.

Mt. Healthy's two-part test for "dual motive" cases requires that, once the complainant has shown that the protected activity "played a role" in the employer's decision, the burden shifts to the employer to prove that it would have discharged the complainant, even if the protected activity had not occurred. Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 181 (2d Cir.

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<sup>30</sup> The Fifth Circuit has declined to address whether the "but for" test applied to claims arising under the ERA. See Dunham v. Brock, 794 F.2d at 1039, n. 2, citing McMillan v. Rust College, Inc., 710 F.2d 1112, 1116 (5th Cir. 1983).

1992); Mackowiak, supra.<sup>31</sup> It has been held that the employer bears the risk that the influence of legal and illegal motives cannot be separated because the risk was created by his own wrongdoing. See Mackowiak, supra at 1164. In light of St. Mary's Honor Ctr., supra, however, it may be assumed that the Claimant must ultimately meet the burden of establishing that the discharge was discriminatory. Without such evidence of a dual motive, Complainants would have to prove that the reorganization was a mere "pretext" to discriminate against them because of their protected activities. Mackowiak, supra; St. Mary's Honor Ctr., 113 S. Ct. at 2746-48. In the Fifth Circuit, the standard may be the more restrictive "but for" test, which would require Complainants to show that "but for" their protected activity, the termination would not have occurred, notwithstanding any legitimate reasons advanced by HL&P. See Jack v. Texaco Research Center, supra.

In this case, HL&P's proof becomes especially difficult, partly because of the strong indications that the reorganization was itself a response to the Complainants' protected activities, and partly because of the extent to which the effects of the protected activities permeated and tainted the evaluation process which resulted in the selection of Lamb and Dean for termination in conjunction with that reorganization. The lack of urgency or budgetary necessity, and the timing and character of the reorganization undercut's Employer's claims of legitimacy. The evidence also supports an inference that Dean and Lamb were subjected to disparate treatment in comparison with other similarly situated employees. The process by which the reduction in force was effected, and evaluation which preceded it, and on the basis of which the terminations were justified, raise this issue. See O'Brien v. Stone & Webster Eng'g Corp., 84-ERA-31 (ALJ Dec., Feb. 28, 1985). As in the case at bar, where the termination is of a worker engaged in protected activity, evidence of disparate treatment can be circumstantial evidence that the carefully orchestrated and unique use of the forced competitive evaluation process, reorganization, and related reduction in force comprised a mere pretext for the elimination of targeted employees, in this

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<sup>31</sup>In Carroll, a recent pre-CNEPA case, the Secretary has analyzed the proof required in dual motive cases as analogous to that of "'an affirmative defense: the plaintiff must persuade the fact finder on one point, and then the employer, if it wishes to prevail, must persuade it on another.'" Price Waterhouse v. Hopkins, 490 U.S. at 246." Thus, if an employee proves by a preponderance of the evidence "that illegitimate reasons played a part in the employer's decision, the employer then has the burden of providing by a preponderance of the evidence that it would have taken the adverse action against the employee for the legitimate reason alone," citing Price Waterhouse v. Hopkins, supra at 228. See Carroll v. Bechtel Power Corp., supra, slip op. at 10.

case Lamb, Dean, and Worth. See Priest v. Baldwin Assocs., 84-ERA-30 (June 11, 1986). The abruptness of the terminations, and the failure to allow Lamb and Dean even the normal opportunity to find alternative employment within the company, is compelling evidence of disparate treatment that tends to prove a discriminatory motive.<sup>32</sup>

### Conclusion

From the myriad details of the record, I conclude that HL&P's adverse action against Dean and Lamb was motivated by a desire to put an end to their concerns with, and challenges to, HL&P's management decisions. Dean's and Lamb's concerns had a well established history of contacts with NRC and NRC investigations. Lamb's and Dean's concerns, confrontations with management, and complaints to Speakout and the NRC were widely known directly and indirectly in a relatively small environment where the players were well known to each other and interactions were continuous. The issues were well defined and readily traceable. Dean and Lamb were conspicuous and outspoken concernees. The pursuit of the issues took place over a substantial period of time and affected many people. They resulted in significant responses by STP to the resulting NRC investigations, including internal investigations, reports, and debriefings.

While the various managers may not have known to a certainty all the details of Lamb's and Dean's interactions with the NRC, following their concerns expressed internally at STP, they were sophisticated and had enough pieces of the puzzle to be charged with the knowledge required to establish the nexus between their adverse actions and the Complainants' protected activity. Balcom and Kinsey had a long working relationship, and apparently knew each other quite well. Frequent briefings, audits, and other management interactions, relating to contentious and well defined issues involving conspicuous personalities could hardly have

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<sup>32</sup>Balcom testified that when he was acting manager of the Safeteam program, later called the Speakout program, the program was to be eliminated as a separate functional entity. All the assigned employees were told they would lose their jobs. But they were notified in advance, and provided an opportunity to find another job. Oddly, Balcom denied enough familiarity with the STEP program to concede that it required giving employees to be terminated thirty days notice while on the payroll to find another job. Balcom admitted revoking Lamb's access to the protected area before he told Lamb he was terminated. He said it was "in accordance with standard procedures for people who are going to be terminated." I am not persuaded. Lamb was inappropriately treated in a manner which deviated from established procedure at HL&P under such circumstances. (Tr. 1334-35, 1475-77, Balcom)

avoided tacit understandings and meetings of minds among the managers, including Balcom and Kinsey, who were responsible for the adverse actions. The identification of action advantageous to HL&P, under such circumstances, would not have required a great deal of explicit agreement. Since Dean and Lamb were the other half of the confrontational equation with Randlett, the departure of Randlett obviously did not resolve the problems at NSD from HL&P's point of view. Those that were left in the NSD after Dean, Lamb, Worth, and Neal were gone were likely from past history to be basically compliant team players.

The downsizing of NSD which resulted in Dean's and Lamb's terminations was historically unique at NSD and, apparently, STP. It followed assurances by responsible management that downsizing would not occur at that time. It was not a part of a wide reduction in force at STP. Those eliminated were by all appearances the most conspicuous and persistent whistleblowers at NSD. No employee who was not a whistleblower was terminated. It also is odd that Dean, unlike other NSD employees who followed their transferred responsibilities, did not follow the Safeguards Information responsibilities which were his particular expertise to its new location in a different department. Moreover, although there were some possibly constructive changes that were made as a result of Balcom's reorganization, neither the complexity of the objectives nor any budgetary or other urgency seems to have required the adverse actions which resulted. Indeed, Lamb's and Dean's protected activities, their confrontations with Randlett, and their pursuit of their concerns through channels and to the NRC could be considered to have been, and I find were probably the primary cause of the reorganization of NSD, since they identified significant weaknesses in the system. On that rationale, but for the protected activities, the need for reorganization following Randlett's departure probably would not have arisen as it did. And but for the Complainants' protected activities, including their contacts with the NRC, there would have been no compelling need or desire on HL&P's part to terminate three or four competent employees. Thus, I also find that HL&P has not proved that it would have terminated Dean and Lamb without regard to their protected activities.

Balcom's abruptness in handling the terminations, his refusal to allow bumping, and his failure to provide notice to Lamb and Dean to allow them to seek other employment within the company, bespeak retaliation. Balcom's alleged inquiries regarding alternative positions are not convincing. Lamb was a technically proficient employee with a solid performance record, as proved by his annual performance evaluations. Dean had distinctive expertise on classified document handling, if a less distinguished performance record than Lamb's, and was situated like Lamb vis-a-vis HL&P's adverse action. These considerations are consistent with the conclusion that the selection and adaptation of the SPP's as an element of the STEP process was contrived to facilitate a

preconceived objective. The elimination of the annual performance appraisals in the spring of 1992, at the time of the reorganization, together with the adoption of the unfamiliar SPP's, which could be readily manipulated by unarticulated subjective input, impeaches the integrity of the process and tends to prove that it was unfairly applied to the whistleblowers to achieve predetermined results.

Viewing the record as a whole, I find that the methodologies used by Balcom in effecting the reorganization and terminations, the categorical denials of knowledge of the protected activities by the HL&P managers, and the virtual omnipresence of legal counsel at critical junctures, disclose an artificially contrived effort to insulate the managers from the kinds of information and awareness that sophisticated and diligent managers in such a small and technical environment normally would have had. There is substantial evidence, which with reasonable inferences based upon it, rises to a preponderance, that those managers who were involved in Dean's and Lamb's terminations did have knowledge sufficient to cause them to act as they did, adversely to Dean and Lamb. This is so notwithstanding the protective confidentiality which normally would attend the proper processing of whistleblowers' concerns. An obvious indication of a retaliatory motive was the assignment of negative points to Lamb for a "failure to be supportive of management decisions." Dean's and Lamb's confrontations with management evolved into and mirrored their concerns expressed to the NRC, which investigated those concerns. Given the circumstances of this case, Balcom's concern with internal discipline, and his intimate involvement with the SPP's, those negative points must have reflected antagonism toward whistleblowing, and are indicative of adverse action against whistleblowers. They cannot reasonably be construed merely as mere benign criticism of failure to be team players. Lamb's negative points, like Dean's negative points, were critical factors in the process that led to their respective terminations. Thus it is apparent in the context of this case, that HL&P's adverse action was directed at least as much against Dean's and Lamb's protected activity as any other cause, and, therefore, HL&P acted unlawfully in terminating Dean and Lamb.

I find it incredible that at no time during the planning and approval process for the reorganization, would Balcom have discussed the particular individuals who would be affected by the reorganization. Those individuals were well known to the managers. Such an omission might be understandable, however, if the managers involved knew, or at least tacitly understood, who the affected employees would be. Based on the circumstantial evidence, my observation of the witnesses at the hearing, and my consideration of their testimony in context, I conclude that the categorical denials of knowledge of the Complainants' protected activity are not credible. I conclude that, after a long history of problems such as STP had in relation to NSD, a convenient, but clearly

elective, reorganization of a single relatively small and technically specialized department is not a legitimate cover for getting rid of whistleblowers, and only whistleblowers, who identified many of the most significant problems. I therefore find that the Complainants have satisfied their burden of proof by showing that retaliatory or discriminatory motives were the predominant cause for their terminations, and, indeed, that their terminations would not have occurred but for their protected activity. Thus, they are entitled to relief from HL&P's unlawful adverse action.

HL&P's Motion To Dismiss and/or for Summary  
Disposition of Dean's Complaint

Prior to the hearing HL&P filed a motion to dismiss Dean's complaint brought pursuant to §210(a) of the ERA, or, in the alternative, for summary disposition of that complaint, because about a year after Dean's termination a document alleged to contain Safeguards Information was discovered unprotected in Dean's recently abandoned apartment. Dean contends that he did not have possession of the document, and that the document does not contain Safeguards Information, so that both of HL&P's contentions must fail. (Tr. 388-89S, Dean)

The motion was based upon two propositions. First, §210(g) of the ERA provides,

Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended.

Citing English v. General Electric Company, 683 F. Supp. 1006, 1014 (E.D. No. Car. 1988), aff'd on other grounds, 871 F.2d 22 (4th Cir. 1989), rev'd on other grounds, 496 U.S. 72 (1990), HL&P contends that, even if it violated §210(a) of the ERA by discharging Dean because he voiced concerns about nuclear safety, Dean is absolutely barred from obtaining redress if he has caused a deliberate violation of any nuclear safety requirement. HL&P contends that such a violation should be inferred from the discovery of the document as alleged in Dean's abandoned apartment.<sup>33</sup>

Second, relying on the after acquired evidence doctrine articulated in Summers v. State Farm Mutual Insurance, 864 F.2d 700

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<sup>33</sup> I have the authority to determine whether there has been a violation of the ERA by Dean. See McKinney v. TVA, 92-ERA-22 (ALJ, Mar. 17, 1992)



(10th Cir. 1988), and similar authorities, HL&P also contends that Dean's complaint should be dismissed, because HL&P would have fired him for unauthorized possession of the Safeguarded document if HL&P had been aware of Dean's possession of the document before Dean was actually terminated in May 1992. The motion to dismiss was denied at the commencement of the hearing because material facts were in dispute. Since the hearing, the Supreme Court has decided McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995), which holds that an employee who proves a discriminatory discharge is not barred from all relief if the employer, subsequent to the discharge, discovers evidence of wrongdoing that, by itself, would have led to the employee's discharge on lawful and legitimate grounds had the employer known of it at the time of the discharge.

#### Facts

The operative facts are these. On May 31, 1993, approximately a year after Dean was terminated by HL&P, he suddenly vacated his apartment, apparently for lack of funds, after having just renewed his lease for six months on May 1, 1993. He returned the keys to the manager, with a note indicating that he was abandoning the remaining contents of the apartment. On June 2, when the manager inspected the messy premises, he found, among other things, what ultimately amounted to nine large boxes of documents related to STP and HL&P. The manager secured the apartment and contacted HL&P.

HL&P personnel, after consulting with counsel, went approximately two hours later to take possession of the abandoned documents, which they transferred to the STP site. After further consultation with counsel, Garriss arranged the assignment of Rainosek and Monteith to inventory them. Garriss learned from the apartment manager that the apartment had been occupied by Dean, whom he knew of as working in NSD. The inventory process began on the afternoon of Wednesday, June 2, and was completed the following week. Gutterman, as legal counsel, was aware of the process.

One of these documents that were recovered and inventoried in June 1992 contains what HL&P alleges to be Safeguards Information. Monteith first discovered the document on Thursday, June 3, 1993. He commented that he thought it was Safeguards, and Rainosek called Gutterman. Gutterman examined the document, and then he, Rainosek, and Monteith took the document to Balcom. Rainosek testified that they told Balcom that the document had been found off site, but then purposely did not tell Balcom that it had been found in Dean's apartment, in accordance with an understanding reached when the documents were recovered. Balcom summoned Drymiller, as a classification officer in NSD, who, according to Rainosek and Drymiller, was told what had been told to Balcom. Drymiller opined that the document was Safeguards Information, and took custody of the document. Drymiller then confirmed its origin and status to his satisfaction by reviewing logs and other information. (Tr.

2727, 2729-33 VanValkenburg; 2741-43, 2749-51, Garriss; 2773, 2784-93, Rainosek; 2824-28, 2996-3001, Drymiller; HL&P-113, 114, 117)

The document was an undated draft of a letter and enclosures from HL&P to the NRC purporting to transmit certain changes to the STP Physical Security Plan and Security Personnel Training and Qualification Plan dating from 1987. (HL&P-114) (Tr. 2826-27, Drymiller) HL&P contends that Dean's possession at his apartment of such a document containing Safeguards Information prior and subsequent to his termination was a deliberate violation of NRC regulations adopted pursuant to the Atomic Energy Act of 1954, 42 U.S.C. §2011, and of HL&P's internal security procedures concerning Safeguards Information.

Dean first denied any recollection of having seen the document, or of having taken it to his apartment. Then at the hearing, having examined the redacted version of the document, Dean denied that the document was in his apartment, and suggested that it had been planted by HL&P. Dean testified that he believed that he would have noticed the document while reviewing his papers in preparation for trial. (Tr. 352-53S, 358S, 369-70S, 388S, Dean) Dean described the papers he left in the apartment as "a collection of NUREGs, regulatory guides, various HL&P memos, note and drafts that [he] had taken down through the years, several reference books, related to security and nuclear power, background information [he] used for [his] certified protection exam." (Tr. 351-53S, Dean)

By reason of experience and job description, Dean was thoroughly familiar with the security requirements for Safeguards Information. He had been a classifications officer for more than four years. (Tr. 386S, Dean) There is no dispute that his duties required him to handle large amounts of Safeguards Information, and it appears that he was generally conscientious in that regard, despite three written reminders in 1988, 1990, and 1991 for apparently negligent failure on three separate occasions to control particular Safeguards Information properly. At the time of his termination on May 4, 1992, however, Dean was also on a form of probation following his being placed in November 1991 on "decision making leave," a form of discipline which made his employment status precarious.

#### Safeguards Information Status

Dean contends that, despite the document's being stamped Safeguards Information on its last page and despite boilerplate language in the draft cover letter indicating that secure handling was required, the document did not, in fact, contain substantive Safeguards Information. The argument was based on the current status of the document, the fact that it was an undated draft document, and on expert opinion that the contents of the document were not properly classified as Safeguards Information. As a draft

document, it would normally have been handled differently from a document in final form classified as Safeguards Information. The draft document would normally have had a short span of utility, and, therefore, would normally have been destroyed promptly and in the ordinary course. This undated draft document, some of whose contents were superseded in the final document, appears to have been both stale and obsolete when discovered. Thus, there would have been no reason for Dean to have kept the document because of its substance, especially since that substance was shown to have changed in subsequent drafts.

Dean's arguments are plausible and reasonably persuasive. There is virtually no likelihood that any of the undated contents of the draft document found in Dean's apartment would have been of the slightest use to anyone, let alone a spy or saboteur. However, it is also clear that the Safeguards classification implied in the cover letter and reflected in the stamped label on the last page of the document reflects a technical and apparently bona fide application of professional judgment, presumably at the time the document was prepared. There is no evidence that the document was decontrolled. I find, therefore, that the controlling fact is that the document contained overt indicia, the Safeguards Information stamp and boilerplate directive in the cover letter, which would make obvious to a lay person as well as someone with Dean's expertise, that it contained Safeguards Information and had not been decontrolled. That fact should have controlled its status and handling by anyone, including Dean. It follows that, if Dean's possession of the document is inferred from its presence among the abandoned effects in his apartment, there would be at least a technical violation by Dean of the ERA's security requirements.

#### Possession; Related Inferences

The chain of custody of the documents recovered from Dean's apartment might be imperfect, but the nature and age of the draft document under the circumstances make it very unlikely that the document would have been planted by HL&P as implied by Dean. (2747-50, Garriis; 2783-84, Rainosek) The manner in which the documents were retrieved and inventoried, and the incentives behind the process, make the contamination of the process by an extraneous document of such a nature most unlikely. The conflicting assertions by Dean regarding its alleged presence among his abandoned effects in the apartment undercut his credibility, but are not affirmative evidence of possession or knowledge. Dean's possession of the document may fairly be inferred under the circumstances from its discovery among the material left in his recently abandoned apartment. Possession of the document at the apartment may be presumed to have been unauthorized, in the absence of a showing to the contrary, if it qualified as Safeguards Information.

Assessment under ERA §210(g)

Whether, under the circumstances of this case, Dean's inferred possession of this document would constitute a deliberate violation of a nuclear safety requirement or an unauthorized disclosure in violation of the Atomic Energy Act is doubtful. I find that it does not. Section 210(g) requires deliberate causation of any violation of the ERA or the Atomic Energy Act, which must not be at the direction of the employer, HL&P. There is no allegation or suggestion of employer direction. The lapse of several years between the time that the draft document was apparently created in 1987, when it would have had currency, and the time it was culled by HL&P and identified as Safeguards Information in May 1993, severely attenuates the normal inferences of knowing possession, knowledge of origin, and guilty possession which could be derived by analogy to the criminal law's inference from unexplained possession of recently stolen property.

There is no affirmative evidence that Dean's possession of the document was knowing, let alone deliberate. If he had recognized the document as being Safeguards Information, it would have been irrational for Dean to have assumed the risk of knowingly or deliberately having and maintaining possession of such an obsolete and apparently useless document five years after it was created. Presumably, the document would have been destroyed in the ordinary course. The document was the only document of its kind culled from nine large boxes of documents, and its existence among that mass was not proved to be deliberate. The hypothesis of an accidental, if inexcusable, oversight resulting in negligent possession of a nondecontrolled Safeguards document is at least as reasonable on the record before me than that of a deliberate violation of the law in the circumstances of this case, and I find on this record that the former hypothesis is more reasonable.

HL&P, therefore, has not proved that Dean's possession of the document, inferred from the circumstances, was a deliberate violation of nuclear safety requirements such that, if sanctions were not invoked, the violation would promote or countenance an abuse of the protections which might otherwise be afforded to Dean by §210(a). See generally, English v. General Elec. Co., 496 U.S. 72, 110 S. Ct. 2270, 2280 (1990) I find, therefore, that Dean should not be barred from relief by §210(g) of the ERA.

#### Assessment Under After Acquired Evidence Doctrine

The application of the after acquired evidence doctrine creates greater difficulty. Dean's employment status was allegedly so precarious that Balcom testified that his termination would have been mandated if HL&P had known of his possession in his apartment of the Safeguards document in question. That contention is plausible. Dean had three reprimands for deficient handling of Safeguards Information. The last of these warned of possible termination in the event of another such incident. In addition, the Dean-Sheesley incident was significant enough that Dean was put

on "decision making leave" and on an essentially probationary status. He was not fired at the time, as Randlett urged, because of a considered and advised decision by Kinsey.<sup>34</sup> Although Dean thought retaliation was involved, I am not persuaded that the outcome of the incident was so tainted, or, because of its spontaneity, that it was a pretext for any improper purpose. Even if HL&P's judgment in this regard were tainted by the discriminatory action which led to Dean's termination, it is impossible to determine whether, or to what extent, an improper motive might have predominated, or that the disciplinary action taken was unjustified under the circumstances, even recognizing that Dean and Sheesley, his supervisor, had little use for each other.

As noted, the age of the document, the status of the document itself, and the questionable status of the substantive contents of the document as Safeguards Information indicate that, at most, a technical violation of Safeguard Information security requirements was involved. The fact that there was only one such document in the nine boxes of documents inventoried suggests that a negligent oversight involving a relatively insignificant document and no substantial security risk, led to the presence of the document among Dean's effects. The record as a whole demonstrates quite clearly that Dean's motives, like Lamb's, were based, not on self-aggrandizement, but on a genuine concern, whatever its wisdom, for

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<sup>34</sup>Garris, the Manager of Human Resources for HL&P at STP, who supervised recovery of the documents from Dean's abandoned apartment, also described disciplinary policy at STP as follows:

...[W]e've got a very...formal policy of progressive discipline. It's based on severity of incidents. It's based on number of incidents. It's based on composite of contact sessions. Discipline starts off with counseling sessions, then moved to oral reminders, written reminders, leave of absence, and then potential termination if the severity of an action is that severe. You can jump steps, if necessary, based on severity of the action...You try to work with the employee in a progress[ive] discipline process typically. And our is probably typical of the industry.

Based on an hypothetical question related to Dean's disciplinary record, STP disciplinary policy, and the discovery of the allegedly Safeguards information document under the circumstances as generally described, Garris stated that he would have recommended Dean's involuntary termination. He also stated that, based on his review of Dean's file and other research, he had no knowledge that Dean had ever deliberately violated any regulation, procedure, or policy of the company. (2738, 2752, 2754-59, Garris)

the improvement of security at STP. Nevertheless, the wholly fortuitous discovery of the document by HL&P as a consequence of the events put in motion by HL&P's discharge of Dean does not, as a matter of law, preclude HL&P's use of that discovery as a legitimate basis for Dean's discharge. See McKennon at 886.

Dean's negligent possession of the document might appear less serious than those situations involving resume fraud, falsified documents, or unauthorized removal of confidential files, discovered after the alleged discriminatory action and utilized as after-acquired evidence to justify independently a contested personnel action. Compare Summers, supra (multiple additional falsifications while on probation); O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466 (D. Ariz. 1992), Bonger v. American Water Works, 789 F. Supp. 1102 (D. Colo. 1992), and McKennon v. The Nashville Banner Publishing Co., 797 F. Supp. 604 (M.D. Tenn. 1992)(removal and copying of multiple confidential documents). However, absent a showing of what would be a clearly arbitrary discharge by HL&P, or what would be a discharge inextricably responsive to unlawful motives, it is not appropriate for me to substitute my judgment of the severity of this act of negligence under the circumstances for that of the employer. The issue, therefore, is whether HL&P would, in fact, have discharged Dean for this negligent act, and not for reasons related to Dean's protected activities, had HL&P known of it at the time of Dean's termination on May 4, 1992.

While I have substantial doubt that the document would properly qualify as current Safeguards Information, HL&P has proved a colorable claim or reasonable cause to believe that it does. The document bears objective evidence of what appears to be unmodified standard warnings of controlled status. Thus, although the technical violation alleged is attenuated and de minimis, I must conclude that HL&P would have fired Dean had it known of the presence of the document in his apartment on May 4, 1992, even though I doubt that, but for Dean's probationary status, and the history of three prior violations, "the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." See McKennon at 886-87. It seems quite clear, however, that, unless enjoined, HL&P would have discharged Dean, under the circumstances, on that ground, which, under the circumstances, may be deemed legitimate and not wholly unjustified, or would lawfully discharge him on that separate ground if he were ordered to be reinstated as a remedy for his discriminatory discharge.

#### Conclusion

Therefore, because his discharge on May 4, 1992, was effected in violation of the ERA, Dean is entitled to back pay from May 5, 1992, until May 31, 1993. No extraordinary equitable circumstances

further affect the relief to which he is entitled. The motion, therefore, is denied with respect to the bar under §210(g) of the ERA, and is granted in part and denied in part with respect to the relief HL&P has sought based on the after acquired evidence pursuant to McKennon.

#### The Remedy

If a respondent is found to have violated the ERA, "the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment. . . ." 42 U.S.C. §5851(b)(2)(B). See Pillow v. Bechtel Constr., Inc., *supra*, slip op. at 25; see generally Wells v. Kansas Gas & Elec. Co., 85-ERA-72 (Sec. Dec. Mar. 21, 1991) slip op. at 17. In addition, "the Secretary may order such person to provide compensatory damages to the complainant" and shall assess costs and expenses, including attorney fees, reasonably incurred in bringing the complaint. *Id.*; DeFord v. Secretary of Labor, 700 F.2d 281, 288-89, 291 (6th Cir. 1983). A complainant is entitled "only to recover damages for the period of time he would have worked but for wrongful termination; he should not recover damage for the time after which his employment would have ended for a nondiscriminatory reason." See Blackburn v. Martin, 932 F.2d 125, 129 (4th Cir. 1992). A complainant may also be awarded compensatory damages for pain and suffering, mental anguish, embarrassment, and humiliation. DeFord, 700 F.2d at 283. Such an award may be supported by the circumstances of the case and testimony about the physical or mental consequences of retaliatory action. See Lederhaus v. Paschen, 91-ERA-13 (Sec. Dec., Jan. 13, 1993) slip op. at 10.

In their opening statement, Complainants declared their explicit claims for relief. On their behalf, counsel expressly identified "abatement of the discriminatory conduct, full restoration of their positions with all privileges, welfare or retirement benefits, medical insurance, everything that they had at the time they were terminated, all back pay with interest, compensatory damages for [extensive] metal anguish...." They also sought compensatory damages for extensive damages to their careers, injunctive relief against future discriminatory conduct, and to protect against termination without good cause, a directive to HL&P to establish an effective system for addressing internal complaints in lieu of the Speakout program. Complainants sought exemplary damages based on allegedly egregious facts. (Tr. 123-24)

Neither party briefed these issues. The focus of the testimony was upon the merits of the claims. The focus of the briefs of both parties was upon the difficult and complex issues of

entitlement based on the extensive record in this case. Also, Complainants suggest in their reply brief that "HL&P lost the trust of the NRC which shut their operations down in February of 1993," but that event, of whatever significance to this case, is dehors the record. (Complainants' reply brief at 20) Nevertheless, such an event could substantially affect the character and scope of the relief available.

With respect to damages, Lamb testified generally as to the financial and personal effects the termination had upon him. He described serious emotional impacts, marital problems, loss of income from his salary of approximately \$50,083 at the time of termination, the loss of job security, and of very substantial anticipated future earnings and benefits at HL&P. He described his frustration in seeking employment, and his costs of job search estimated to be about \$4000. He described being forced to sell his house without profit when he could no longer make the mortgage payments. He described invading all of his savings of about \$33,000, and his wife's savings of about \$7000. He described his accumulation of undischarged indebtedness and resulting insolvency or possible bankruptcy in the near future. He described his loss of health insurance for himself and his wife, and his acceptance after an extensive search for employment of a job selling marine supplies at \$9 per hour or at greatly reduced earnings of about \$17,800 per year. (Tr. 373-91, Lamb; C-67)

Dean testified that at the time he was terminated he was earning a salary of approximately \$35,600 per year, or approximately \$2,966 per month. He described a frustrating effort lasting about fourteen months to find employment, which resulted in his securing a part time minimum wage job delivering pizzas beginning the month before the hearing. With tips he estimated his earnings to be \$145-50 per week or \$600 per month. Dean described the loss of his apartment, and inability to get a lease because of his unemployed status, and reduced circumstances to an unairconditioned room in a boarding house. He described using up savings of over \$15,000, his loss of health insurance coverage, the forced sale of all of his possessions, and the emotional impact of his experience. (Tr. 808-15, Dean; C-26)

The record that has been developed establishes that Lamb is entitled to reinstatement to his former supervisory position, or its equivalent, without penalty or disadvantage, with back pay beginning at the rate of compensation he was paid when wrongfully terminated on May 4, 1992, with interest until the date paid. He is entitled, at least, to the restoration of all employment benefits and entitlement that obtained when he was discharged.

Because of the application in this case of the "after acquired evidence" doctrine, Dean is not entitled to reinstatement. He is entitled to back pay beginning at the rate of compensation he was paid when he was wrongfully terminated on May 4, 1991, until the



date that the document allegedly containing Safeguards Information was identified as such by HL&P on June 3, 1993. (Tr. 2822-24, Drymiller) He is entitled to the restoration of all employment benefits and entitlement that obtained when he was discharged, or their comparable cash value to the extent that they cannot be provided in kind without his formal reinstatement.

The instant record does not support an award of exemplary damages, and that claim is rejected. In the absence of specific proof and adequate briefing as to either entitlement or quantum related to claims for compensatory damages, the parties are authorized to file an appropriate petition for supplemental relief, together with supporting points and authorities, or to negotiate and agree to a settlement of such claims to be submitted for approval, and supplemental recommended decision and order, to the undersigned within sixty (60) days. The law allows the award of compensatory damages in appropriate cases, but whether such an award would be appropriate in this case is unresolved on the instant record. Any such petition shall not affect or delay this initial recommended decision and order finding entitlement and awarding reinstatement to Lamb, and back pay with interest and employment benefits and entitlement to each of the Complainants.

Although not expressly requested or supported by petition of record, I find that Complainants are entitled to reasonable legal fees in an amount to be negotiated and agreed upon among the parties, or submitted with appropriate supporting documentation for approval within sixty (60) days.

#### RECOMMENDED ORDER

Pursuant to 42 U.S.C §5851(B)(2)(b) and the foregoing,

1. HL&P shall take affirmative and appropriate action forthwith to abate all discriminatory actions against personnel who engage in protected activity as defined under the ERA.
2. HL&P shall forthwith reinstate as of May 4, 1991, Complainant, David R. Lamb, to his former position or to a substantially equivalent position at the South Texas Nuclear Project, with all rights, terms, conditions, privileges, and benefits of his employment that he had at the time of his termination or might have accumulated during his unlawful separation from his employment;
3. HL&P shall pay to Complainant, David R. Lamb, all salary and compensation (including back pay), including employment benefits and entitlements, he would have received, but for his unlawful termination on May 4, 1991.
4. HL&P shall pay to Complainant, James J. Dean, all salary and compensation, including employment benefits and entitlements, he

would have received, but for his unlawful termination on May 4, 1991, until June 3, 1993. To the extent that employment benefits and entitlement to which he would otherwise have been entitled cannot be recovered by Dean without formal reinstatement, he shall be paid their comparable value in cash.

5. HL&P shall pay to each Complainant interest on the total sum due each, exclusive of attorneys' fees, at the rate specified in 28 U.S.C. §1961, commencing from the date or dates such salary and other compensation and benefits would have been due until payment.

6. HL&P shall be entitled to credit for such earnings, or a reasonable approximation thereof, as each Complainant shall have received during the applicable period, against payments for which HL&P would otherwise be liable.

7. Complainants shall file with the undersigned within sixty (60) days of the date of this order any petition for supplemental relief related to compensatory damages that should be recommended to the Secretary for approval. Respondent shall file its response, if any, within thirty (30) days of receipt of any such petition.

8. HL&P shall pay to Complainants a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witnesses' fees) reasonably incurred by the Complainants, jointly and severally, for, or in connection with, the bringing of their respective complaints. Complainants shall file with the undersigned within sixty (60) days of this order any petition for such amount, together with appropriate supporting documentation, that should be recommended to the Secretary for approval. Respondent shall file its response, if any, within thirty (30) days of receipt of any such petition.

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EDWARD TERHUNE MILLER  
Administrative Law Judge

Washington, D.C.